TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1957

No. 492

WALTER W. FLORA, PETITIONER,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 23, 1957
CERTIORARI GRANTED NOVEMBER 25, 1957

SUPREME COURT OF THE UNITED STATES

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RECORD PRESS, PRINTERS, NEW YORK, N. Y., JANUARY 27, 1958

[fol. 2]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

WALTER W. FLORA, Plaintiff,

v.

UNITED STATES OF AMERICA, Defendant.

No. 3916, Civil

COMPLAINT—Filed August 3, 1956

Plaintiff brings this action against the United States of America for recovery of an overpayment of internal revenue taxes pursuant to the provisions of 28 USC sec. 1346(a)(1), the amount claimed is less than $10,000, and alleges:

1. Plaintiff is a citizen of the United States.

2. The nature of plaintiff's claim is for the recovery of $5,058.54, the principal amount of income taxes illegally and erroneously assessed and collected from plaintiff for the calendar year 1950, together with interest thereon.

3. Plaintiff at all times herein pertinent was and is a member of the partnership doing business under the firm name and style of Flora Engineering Company; that during the year 1948, plaintiff personally became a member of the Chicago Board of Trade and the New Orleans Exchange and as a member of such organizations was entitled to go and did go upon the floors thereof and engage in a great many commodity transactions in his behalf and in behalf of said partnership; that during the year 1950, the said partnership actively engaged in the business of buying and selling commodities and comcodity (sic) futures, which commodities and commodity futures so purchased by the [fol. 3] partnership were property held by it for sale to customers in the ordinary course of trade or business; that during the year 1950, the said partnership sustained

a net loss in the amount of $85,216.10 in the purchase and sale of such commodities and commodity futures, one-half of which loss was chargeable to and sustained by plaintiff.

2. (sic). That said partnership regularly filed its income tax information return, Form 1065, for the year 1950, in which said return the partnership claim said loss of $85,216.10 as ordinary business loss; that each of the two partners thereafter claimed one-half of said loss, in the amount of $42,608.05, as ordinary business loss upon his or her individual report of income; that on or about the 10th day of March, 1952, the Commissioner of Internal Revenue, acting through the Internal Revenue Agent in Charge, disallowed said loss as an ordinary deduction from business income and levied deficiency assessment against each of the partners, including plaintiff, in the amount of $27,251.13; that subsequently and prior to June 8, 1953, plaintiff paid upon said deficiency assessment the total sum of $5,058.54, in payments as follows: March 11, 1953, the sum of $2,178.92; May 20, 1953, the sum of $2,879.62; that on or about said June 8, 1953, plaintiff regularly filed his claim for refund in said amount, setting forth in said claim his reasons for requesting such refund, a full, true and correct copy of which claim is hereto attached as Exhibit "A" and by this reference incorporated herein as a part of this Complaint; that subsequently and in connection with the submission of an offer in compromise by plaintiff to the Bureau of Internal Revenue, plaintiff filed a withdrawal of said claim; that subsequently and on or about March 5, 1955, plaintiff withdrew his said offer in compromise and renewed his claim for refund, which renewal was effected by the filing of a new claim for refund in words and figures identical with those set forth in Exhibit "A" above referred to an (sic) incorporated herein; that said claim for refund as so renewed has been rejected by direction of the Commissioner on or about the 13th day of July, 1955.

3. (sic) That by reason of the premises, there has been illegally and unlawfully collected from the plaintiff the sum of $5,058.54, which sum, with interest as allowed by law, plaintiff is entitled to recover in this suit.

[fol. 4] Wherefore, plaintiff prays judgment against the defendant in the amount of $5,058.54, together with interest at the rate of 6% per annum upon the amount of $2,178.92 from and after March 11, 1953, and upon the amount of $2,879.62 from and after May 20, 1953.

A. G. McClintock, Attorney for Plaintiff.

Exhibit A to Complaint

U. S. Treasury Department—Internal Revenue Service

Form 843 CLAIM

Rev. Jan. 1955 To Be Filed With The District Director Where Assessment was Made or Tax Paid

The District Director will indicate in the block below the kind of claim filed, and fill in, where required.

___ Refund of Taxes Illegally, Erroneously, or Excessively Collected.

___ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

___ Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

Name of taxpayer or purchaser of stamps: Walter W. Flora.

Number and street: 4101 East 17th Avenue.

City, town, postal zone, State: Denver 3, Colorado.

1. District in which return (if any) was filed: Cheyenne, Wyoming.

2. Name and address shown on return, if different from above

3. Period—If for tax reported on annual basis, prepare separate form for each taxable year: From Jan. 1, 1950. To Dec. 31, 1950.

[fol. 5] 4. Kind of tax: Income tax.

5. Amount of assessment: $27,251.13.
Dates of Payment: 3-11-53, $2,178.92; 5-20-53, $2,879.62.

6. Date stamps were purchased from the Government: ....

7. Amount to be refunded: $5,058.54.

8. Amount to be abated (not applicable to income, estate, or gift taxes): $.....

9. The claimant believes that this claim should be allowed for the following reasons: Reasons are set forth on Schedule 1, attached hereto and made a part hereof by reference.

I declare under the penalties of perjury that this claim (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is true and correct.

Dated June 8, 1953

Walter W. Flora

[fol. 7] IN THE UNITED STATES DISTRICT COURT

ANSWER—Filed October 3, 1955

The defendant by its attorney, John F. Raper, Jr., United States Attorney for the District of Wyoming, answers the plaintiff's complaint as follows:

First Defense.

For a first defense the defendant alleges that:

I. Plaintiff's complaint fails to state a claim within the jurisdiction of this Court and fails to state a claim upon which relief may be granted for the reason that the complaint shows on its face that plaintiff has not paid all of the individual federal income taxes assessed against him for the calendar year 1950, part of which plaintiff seeks to recover in this action.

II. Plaintiff's complaint states and admits in the fourth numbered paragraph thereof, numbered paragraph 2, that the Commissioner of Internal Revenue levied a deficiency assessment against the plaintiff in the amount of $27,251.13; and that plaintiff has paid only the total sum of $5,058.54 upon said deficiency assessment.

III. On March 27, 1953, the Commissioner of Internal Revenue made a deficiency assessment against plaintiff for individual income taxes and interest thereon according to law for the calendar year 1950 in the amount of $27,251.13 taxes and $1,657.47 interest, making a total deficiency assessment of $28,908.60.

IV. Plaintiff has paid only the total amount of $5,058.54 on the aforesaid deficiency assessment, leaving an outstanding balance now due and owing to the United States of America of $23,850.06, plus interest thereon according to law.

* * * * * * *

[fol. 10] Wherefore, the United States of America prays that the plaintiff take nothing by this action and the defendant have a money judgment against the plaintiff, Walter W. Flora, in the amount of the outstanding unpaid balance of the plaintiff's individual income tax liability for the year 1950 as set out above, plus the penalty of $45.00, together with interest thereon according to law and for such other and further relief as to the court may appear just and proper in the premises.

John F. Raper, Jr., United States Attorney, District of Wyoming. By: William G. Walton, Assistant U. S. Attorney, District of Wyoming.

* * * * * * *

[fol. 11] IN THE UNITED STATES DISTRICT COURT

ORDER OVERRULING MOTION TO DISMISS SET FORTH IN DEFENDANT'S ANSWER—February 27, 1956

The matter of the First Defense, pleaded in the Answer filed by the defendant herein, being in effect a motion to

dismiss for failure to state a claim within the jurisdiction of this court and failure to state a claim upon which relief may be granted, having heretofore come on for hearing by the Court, and having been argued by counsel for the parties hereto and by the Court taken under advisement, and the Court being now fully advised in the premises:

It Is Ordered by the Court that the said motion respecting defendant's First Defense, or motion to dismiss, be and the same is hereby overruled.

Dated February 27, 1956.

Ewing T. Kerr, Judge.

February 27, 1956.

[fol. 12] In the United States District Court

Judge's Memorandum—Decided July 24, 1956

Kerr, Judge.

The primary question here is whether losses sustained by taxpayer in 1950, resulting from trading in commodities and commodity futures, were capital losses within the meaning of the term defined by Section 117(a)(1) of the Internal Revenue Code of 1939.

The taxpayer by this action seeks to recover payments made by him upon his 1950 income tax which he claims to have been illegally assessed.

Flora, the taxpayer, is a partner in the Flora Engineering Company. In its partnership return of income for 1950 it claimed as ordinary loss the amount of $85,216.10 growing out of transactions in commodities and commodity futures during that year. The loss so claimed was disallowed by the Bureau, thereby resulting in an additional income to taxpayer in the amount of $42,608.05. On March 27, 1953, a deficiency assessment was made against the taxpayer in the amount of $27,251.13. Taxpayer paid the sum of $5,958.54 on said deficiency assessment and this action has for its purpose the recovery of said sum so paid.

The government filed a motion to dismiss this action and as a basis therefor alleged that this Court was without

jurisdiction to hear and determine the matter as the complaint showed conclusively on its face that the taxpayer has not paid the full amount of the tax deficiency assessed against him.

Historically, it has been the established policy of our tax system for the taxpayer to pay first and litigate afterwards. This is the method of corrective justice consistently followed by the lower courts since the decision of Cheatham v. United States, 92 U.S. 85. Recently, however, in the case of Bushmiaer v. United States, 230 F.2d 146 (8 Cir.), page 149, the Court held: "There is no provision in the revenue act specifically requiring the taxpayer to pay the full amount of the additional assessment unless that may be inferred from the provision requiring the taxpayer as a condition precedent to his right to maintain a civil action in the District Court to file a claim for refund." The court in reversing the (sic)

[fol. 13] The decision of the trial court allowed suit to be maintained where the taxpayer paid the sum of $5,000.00 on an assessment of $137,987.28.

The Bushmiaer case is in direct conflict with Suhr vs. United States, 18 F.2d 81 (3 Cir.), where the court stated at page 83:

> "None of the various tax acts provide for recourse to the courts by a taxpayer until he has failed to get relief from the proper administrative body or has paid all the taxes assessed against him. The payment of a part does not confer jurisdiction upon the courts. Blair v. U. S. ex rel. Birkenstock, supra."

It is important to note that in the Cheatham case the court said at page 88:

> "So also, in the internal-revenue department, the statute which we have copied allows appeals from the assessor to the commissioner of internal revenue; and, if dissatisfied with his decision, on *paying the tax* the party can sue the collector; and, if the money was wrongfully exacted, the courts will give him relief by a judgment, which the United States pledges herself to pay.

"It will be readily conceded, from what we have here stated, that the government has the right to prescribe the conditions on which it will subject itself to the judgment of the courts in the collection of its revenues."

And again at page 89:

* * * "It is essential to the honor and orderly conduct of the government that its taxes should be promptly paid, and drawbacks speedily adjusted; and the rule prescribed in this class of cases is neither arbitrary nor unreasonable." * * * "He can, if the decision is delayed beyond twelve months, rest his case on that decision; or he can pay the amount claimed, and commence his suit at any time within that period."

It will be noted that the Court refers to paying "the tax" as a prerequisite to suit for recovery. It contemplates a payment of the entire tax assessed and not a token payment [fol. 14] for the purpose of obtaining a judicial determination of the unpaid balance prior to the payment of the same.

This principle has been consistently approved by the Supreme Court in the following cases: Savings Institution v. Blair, 116 U.S. 200; Dodge v. Osborn, 240 U.S. 118; Graham v. Dupont, 262 U.S. 234; Phillips v. Commissioner, 283 U.S. 589; United States v. Jefferson Electric Company, 291 U.S. 386; Dobson v. Commissioner, 320 U.S. 489.

In 1924 Congress recognized the hardships imposed on taxpayers in being required to pay the tax assessed as a condition precedent to bringing a suit for recovery of the same and established the Board of Tax Appeals (now the United States Tax Court). The Board of Tax Appeals was set up as a place where the validity of an income tax assessment could be litigated prior to the payment of the deficiency assessment. It is important to quote the precise language of the House Committee on Ways and Means when it created the Board of Tax Appeals:

"[H. Rep. No. 179, 68th Cong., 1st Sess., pp. 7-8 (1939-1 Cum. Bull. (Part 2) 241, 246-247)]:

"The committee recommends the establishment of a Board of Tax Appeals to which a taxpayer may

appeal prior to the payment of an additional assessment of income, excess-profits, war-profits, or estate taxes. Although a taxpayer may, after payment of his tax, bring suit for the recovery thereof and thus secure a judicial determination of the questions involved, he cannot, in view of section 3224 of the Revised Statutes, which prohibits suits to enjoin the collection of taxes, secure such a determination prior to the payment of the tax. The right of appeal after payment of the tax is an incomplete remedy, and does little to remove the hardship occasioned by an incorrect assessment. The payment of a large additional tax on income received several years previous, and which may have, since its receipt, been either wiped out by subsequent losses, invested in non-liquid assets, or spent, sometimes forces taxpayers into bankruptcy, and often causes great financial hardship and sacrifice. These results are not remedied by permitting the taxpayer to sue for the recovery of the tax after this payment. He is entitled to an appeal and to a determination of his liability for the tax prior to its payment."

[fol. 15] I have carefully considered the decisions respecting the rights of the taxpayer and it is my reasoned judgment that since the complaint shows on its face that the plaintiff has not paid the entire tax assessment he should not maintain the instant suit. However, since the Third and Eighth Circuits are in conflict on the subject and this Circuit has not had occasion to pass on the matter, I deem it advisable to pass upon the merits of the case as the record consists only of a stipulation of facts and a few pages of testimony.

* * * * * * * * *

Filed July 24, 1956.

[fol. 18] In the United States District Court

Findings of Fact and Conclusions of Law—Filed August 21, 1956

The above-entitled action came regularly before the Court for trial without a jury on the 10th day of May, 1956,

plaintiff appearing by his attorney, A. G. McClintock, and [Fol. 19] and (sic) defendant appearing by its attorneys, John F. Raper, Jr., United States Attorney for the District of Wyoming and Thomas H. Foye, Attorney, Tax Division, Department of Justice, and the Court, having heard and considered the stipulation of facts and the evidence produced by and on behalf of the plaintiff and the defendant and the briefs and arguments of counsel, and being fully advised on the premises, does hereby make and enter its findings of fact and conclusions of law.

Findings of Fact.

1. Walter W. Flora, the plaintiff here, is a partner in the Flora Engineering Company.

2. The Flora Engineering Company is a family partnership and was formed to engage in the business of engineering and farming, although during 1950, no farming activities were carried on by it.

3. During 1950, the plaintiff, in his individual capacity and not as a member of the firm Flora Engineering Company, became a member of the Chicago Board of Trade and the New Orleans Exchange, and as such member was authorized to go upon the floor of those exchanges and personally buy and sell commodities or commodity futures.

4. During 1950, the plaintiff traded on these exchanges for his own account or for the account of the partnership. At no time did he trade for the account of anyone else.

5. During 1950, the plaintiff spent 60% to 70% of his time trading on the floors of these exchanges. In 1950, the total volume of trading carried on by him in commodity futures was $16,940,000 while the total volume of trading carried on by him in actual commodities in that year was $322,000. He carried out 397 transactions during 1950.

6. The Flora Engineering Company maintained an office in Denver, Colorado, in its name and from that office, the plaintiff contacted people by telephone in an attempt to sell actual commodities to them. In some cases, people contacted him at his office, in an attempt to buy actual commodities.

7. The plaintiff did not maintain a board in the office [fol. 20] referred to in paragraph 6 for quoting prices of commodities or commodity futures. He did not advertise through any of the normal advertising media nor did he employ any salesmen or customers' men.

8. All of the plaintiff's transactions during 1950 in both commodities and commodity futures were entered into by the plaintiff in the expectation of making a profit only as a speculator. He did not expect a middleman's profit from any of his transactions in commodities or commodity futures. In fact, the plaintiff did not receive any compensation for services performed by him as a middleman but derived his profits or suffered his losses due to his transactions in the market as a speculator.

9. During 1950, neither the plaintiff nor the Flora Engineering Company were engaged in farming, manufacturing, or any other activity which would require the use of either the actual commodities or the commodity futures traded in by the plaintiff.

10. During 1950, the plaintiff sustained losses in the amount of $85,216.10 growing out of transactions in commodities and commodity futures during that year.

11. In its partnership return of income for the year 1950, Flora Engineering Company claimed as an ordinary loss this amount of $85,216.10. The Internal Revenue Service disallowed this as an ordinary loss, which disallowance resulted in an addition to the income of the plaintiff in the amount of $42,608.05. Accordingly, a deficiency was assessed against the plaintiff for unpaid income taxes in the amount of $27,251.13, plus interest of $1,657.47 making a total deficiency assessment of $28,908.60. An additional penalty of $45.00 plus interest thereon according to law was assessed against the plaintiff in June 1955.

12. The plaintiff has paid a total of $5,058.54 on these assessments. This sum was paid as follows: $3,178.92 on March 11, 1953 and $2,879.62 on June 21, 1953. The balance of these assessments has not been paid.

13. Subsequent to making these payments the plaintiff filed a claim for refund thereof. This claim was filed on the

[fol. 21] theory that losses sustained by the plaintiff during the year in question were ordinary losses and should have been deductible as such. The claim was disallowed on behalf of the Commissioner of Internal Revenue by registered notice of disallowance dated July 13, 1955. The claim was disallowed because of a determination by the Commissioner of Internal Revenue that the losses sustained during the year in question were capital losses.

Conclusions of Law.

1. The plaintiff's principal activity during the year 1950 was trading in commodity futures. His trading in actual commodities was a natural incident of future trading. For that reason, losses sustained in both types of activity shall receive the same tax treatment.

2. The losses sustained by the plaintiff in trading in the commodities and commodity futures during 1950 were capital losses within the meaning of the term as defined by Section 117(a)(1) of the Internal Revenue Code of 1939.

3. Judgment will be entered against the plaintiff and in favor of the defendant on its counterclaim.

To which and all of which findings of fact and conclusions of law the plaintiff at the time excepted and exception allowed.

Dated this 21 day of August, 1956.

Ewing T. Kerr, United States District Judge.

Approved as to form: A. G. McClintock, Attorney for Plaintiff; John E. Raper, Jr., United States Attorney.

In the United States District Court

Judgment—August 21, 1956

The above-entitled action came regularly before the Court for trial without a jury on the 10th day of May, 1956, [fol. 22] plaintiff appearing by his attorney, A. G. McClintock, and defendant appearing by its attorneys, John F.

Raper, Jr., United States Attorney for the District of Wyoming and Thomas H. Foye, Attorney, Tax Division, Department of Justice, and the Court, having considered the stipulation of facts and having heard and considered the evidence produced by and on behalf of the plaintiff and the defendant and having considered the briefs and arguments of counsel, and having heretofore made and entered its findings of fact and conclusions of law and the Court otherwise being fully advised:

Now, Therefore, It Is Hereby Ordered, Adjudged And Decreed that plaintiff take nothing by this action and that defendant have judgment against the plaintiff for the amount of $23,895.06 plus interest thereon as allowed by law from the dates of the assessments, with costs herein to be paid by the plaintiff.

To all of which plaintiff at the time excepted and exception allowed.

Dated this 21st day of August, 1956.

Ewing T. Kerr, United States District Judge.

Approved as to form: A. G. McClintock, Attorney for Plaintiff; John F. Raper, Jr., United States Attorney.

Filed August 21, 1956.

In the United States District Court

Notice of Appeal—Filed September 20, 1956

Notice Is Hereby Given That Walter W. Flora, plaintiff above named, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the final judgment entered herein on August 21, 1956, ordering and adjudging that plaintiff take nothing by his action and that defendant have judgment against the plaintiff for the amount of $23,895.06, plus interest as allowed by law.

A. G. McClintock, Attorney for Plaintiff.

[fol. 23] IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ARGUMENT AND SUBMISSION—May 13, 1957

First Day, May Term, Monday, May 13th, 1957.

Before Honorable Orie L. Phillips, Honorable John C. Pickett and Honorable David T. Lewis, Circuit Judges.

This cause came on to be heard and was argued by counsel, A. G. McClintock, Esquire, appearing for appellant, John N. Stull, Esquire, appearing for appellee.

Thereupon this cause was submitted to the court.

[fol. 24] IN UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 5502—May Term, 1957

WALTER W. FLORA, Appellant;

v.

UNITED STATES OF AMERICA, Appellee.

Appeal from the United States District Court for the District of Wyoming.

OPINION—July 1, 1957

A. G. McClintock for Appellant.

John N. Stull (Charles K. Rice, Assistant Attorney General, A. F. Prescott and David O. Walter, Attorneys, Department of Justice, and John F. Raper, Jr., United States Attorney, were with him on the brief) for Appellee.

Before Phillips, Pickett and Lewis, Circuit Judges.

Lewis, Circuit Judge.

[fol. 25] By complaint filed in the United States District Court for the District of Wyoming, plaintiff Flora[1] sought

[1] Hereinafter called the taxpayer.

recovery of the sum of $5,058.54 paid to the government in partial satisfaction of a deficiency personal income tax assessment for the year 1950 in the amount of $27,251.13. Taxpayer alleged the deficiency to be erroneously assessed and the payment to be illegally collected because of a determination by the Commissioner of Internal Revenue that certain losses occurring to the taxpayer during the tax period and reported by him as ordinary losses were properly capital losses within the meaning of that term as defined by sec. 117(a)(1) of the Internal Revenue Code of 1939.

Jurisdiction is alleged to exist under the provisions of 28 U.S.C.A. 1346.[2] Responding to the complaint, the government alleged that the action could not be maintained in [fol. 26] the District Court because the entire amount of the assessment had not been paid and, without waiving this special defense, counterclaimed for the unpaid balance. The District Court denied the special defense[3] but entered judgment upon the merits for the government on its counterclaim.

We are of the opinion that determination of a single question is dispositive of the case: Can a taxpayer maintain a personal income tax refund suit in the District Court without first paying the entire amount of the tax assessed for the period in question?

Beginning with the comments of Mr. Justice Miller in Cheatham v. United States, 92 U.S. 85, 23 L. Ed. 561, and

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[2] Section 1346 provides, in part:

"(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of (1) (As amended by Sec. 1, Act of July 30, 1954, c. 648, 68 Stat. 589) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws * * *."

[3] 142 F. Supp. 602. The trial judge, although indicating he thought the defense meritorious, deemed it better practice to reserve the question for this court in view of what he considered a conflict between the circuits. See Suhr v. U. S. (3 Cir.) 18 F.2d 81; Bushmiaer v. U. S. (8 Cir.) 230 F.2d 146.

continuing through many decisions,[4] the Supreme Court has consistently indicated that full payment of a tax deficiency [fol. 27] is a prerequisite to a judicial claim for refund. And such has been the established policy of our tax system.[5]

In 1924, Congress, recognizing both the desirability of maintaining a minimum of judicial interference with the collection of taxes and the concomitant hardship imposed on taxpayers by an inflexible "pay first, litigate later" rule, established the Board of Tax Appeals (now the United States Tax Court) as a place where the validity of a tax assessment could be initially questioned. In creating the Board of Tax Appeals the House Committee on Ways and Means stated:

> "(H. Rep. No. 179, 68th Cong., 1st Sess., pp. 7-8 (1939) 1 Cum. Bull. (Part 2) 241, 246-247):
>
> "The committee recommends the establishment of a Board of Tax Appeals to which a taxpayer may appeal prior to the payment of an additional assessment of income, excess-profits, war-profits, or estate taxes. Although a taxpayer may, *after payment of his tax*, bring suit for the recovery thereof and thus secure a judicial determination of the questions involved, he [fol. 28] cannot, in view of section 3224 of the Revised Statutes, which prohibits suits to enjoin the collection of taxes, secure such a determination prior to the payment of the tax. The right of appeal after payment of the tax is an incomplete remedy, and does little to remove the hardship occasioned by an incorrect assessment. The payment of a large additional tax on income

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[4] King Co. Savings Institution v. Blair, 116 U.S. 200, 6 S.Ct. 353, 29 L.Ed. 657; Dodge v. Osborn, 240 U.S. 118, 36 S.Ct. 275, 60 L.Ed. 557; Graham v. Dupont, 262 U.S. 234, 43 S.Ct. 567, 67 L.Ed. 965; Phillips v. Commissioner, 283 U.S. 589, 51 S.Ct. 608, 75 L.Ed. 1289; United States v. Jefferson Electric Co., 291 U.S. 386, 54 S.Ct. 443, 78 L.Ed. 859; Dobson v. Commissioner, 320 U.S. 489, 64 S.Ct. 239, 88 L.Ed. 248.

[5] For a discussion of the historical development of this policy see the opinion of Woodrough, Circuit Judge, dissenting in Bushmiaer v. United States, supra.

> received several years previous and which may have, since its receipt, been either wiped out by subsequent losses, invested in non-liquid assets, or spent, sometimes forces taxpayers into bankruptcy and often causes great financial hardship and sacrifice. The results are not remedied by permitting the taxpayer to sue for the recovery of the tax after this payment. He is entitled to an appeal and to a determination of his liability for the tax prior to its payment." (Emphasis supplied.)

Since the establishment of the tax court the distinctive purpose of its creation has been judicially recognized and its intended powers guarded. In Old Colony Trust Co. v. Commissioner, 279 U.S. 716, 721, 49 S. Ct. 499, 73 L. Ed. 918, the Supreme Court stated:

> [fol. 29] "The Board of Tax Appeals, established by Sec. 900 of the Revenue Act of 1924, Tit. IX, c. 234, 43 Stat. 253, 336, was created by Congress to provide taxpayers an opportunity to secure an independent review of the Commissioner of Internal Revenue's determination of additional income and estate taxes by the Board in advance of their paying the tax found by the Commissioner to be due. Before the Act of 1924 the taxpayer could only contest the Commissioner's determination of the amount of tax after its payment."

And in Dobson v. Commissioner, (sic) supra, the court stated:

> "Congress has invested the tax court with primary authority for redetermining deficiencies, which constitutes the greater part of the tax litigation. This requires it to consider both law and facts. Whatever latitude exists in resolving questions such as those of proper accounting, treating a series of transactions as one for tax purposes, or treating apparently separate ones as single in their tax consequences, exists in [fol. 30] the tax court and not in the regular courts."

In view of such consistent statements of the Supreme Court and the actual wording of sec. 7422 of the Internal Revenue Code of 1954[a] we are not impressed with the argument that the instant suit is but a claim for refund for an amount of tax actually paid and does not include a review of the total assessment or the remaining deficiency not paid. Such approach is unrealistic and serves only to conveniently defeat the established purpose and function of the tax court.

Taxpayer's complaint wherein it affirmatively appeared that only a partial payment upon a deficiency assessment had been made failed to state a claim. The government, apparently content with the deficiency assessment, does not contend that its judgment upon counterclaim should be sustained independently.

[fol. 31] The cause is Remanded to the District Court with directions to vacate the judgment of the government upon its counterclaim and to dismiss the action without prejudice.

[fol. 32] IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JUDGMENT—July 1, 1957

Before Honorable Orie L. Phillips, Honorable John C. Pickett and Honorable David T. Lewis, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Wyoming and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that this cause be and the same is hereby re-

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[a] "Civil Actions for Refund.

"(a) No Suit Prior to Filing Claim for Refund.

"No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, * * *."

manded to the said district court with directions to vacate the judgment of the government upon its counterclaim and to dismiss the action without prejudice.

[fol. 33] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 34] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING CERTIORARI—November 25, 1957

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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FILED
SEP 23 1957
JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1956

No. 492

WALTER W. FLORA, PETITIONER,

VS.

THE UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

A. G. McCLINTOCK,
304 W. 20th Street,
Cheyenne, Wyoming,
Counsel for Petitioner.

the issue and take an appeal in accordance with general legal principles, that construction certainly should be favored over one that will result in a considerable limitation on the taxpayer's remedies. Mr. Justice Holmes, in *United States v. Emery Bird, Thayer Realty Company*, 237 U. S. 28, rejected an argument concerning jurisdiction resting upon the "inadmissible premise that the general act of justice embodied in the jurisdiction of the court of claims is to be construed strictly and read with an adverse eye." This Court, in *United States v. Shaw*, 309 U. S. 495, 501 has said:

> "As representative governments attempt to ameliorate inequalities, as necessities will permit, prerogatives of the government yield to the needs of the citizen. . . . When authority is given, it is liberally construed."

Unless, therefore, there are considerations of the greatest weight dictating such adverse construction, the construction given the statute by this Court should be liberal. Practical considerations and taxing policy were advanced to the court in the case of *Hanchett v. Shaughnessy*, (D. C., N.D.N.Y.), 126 F. Supp. 770, as the basis for denying jurisdiction in an essentially similar situation. Reference was made to section 3772 of Title 26 of the Code, (now section 7422 of the Internal Revenue Code, quoted above and in the opinion of the court below) and it was contended that that statute required payment of the full amount of tax before the action could be brought. The court held that the conditions were concerned with the filing of the claim rather than the payment of the tax, upon which the right to maintain the action depends.

> "The section by its language contemplates an action to recover . . . any sum alleged to have been ex-

cessive or in any manner wrongfully collected. . . . The cause of action would seem to have ripened when any sum has been wrongfully collected. Its maintenance is deferred until the prescribed conditions are met."

This decision reads the statute as a whole and gives effect to the whole.

4.

Throughout the course of this suit the government, the District Court and the Circuit Court have stressed the reports of the congressional committees considering the bill that led to the establishment of the Board of Tax Appeals, now Tax Court. Great importance has been placed upon the fact that Congress, as shown by these committee reports, considered that a provision for appeal from the Commissioner's decision prior to the payment of the tax was necessary to remove an existing hardship. It was said that the right of appeal after payment of the tax was an incomplete remedy and that the taxpayer was entitled to an appeal and determination of his tax liability prior to payment. (See H. Rep. No. 179, 68th Cong. 1st Sess. pp. 7-8 (1939), 1 Cum. Bull. (Part 2) 241, 246-247.) The government and lower courts have taken this action as being a legislative construction that no right existed to pay part of the tax and then sue.

We see nothing in this report that requires the conclusion that Congress, speaking through its regularly constituted committees, considered that it was only after payment of the *whole* tax that a suit could be instituted. It

must be fairly obvious that in the ordinary case the taxpayer would prefer to pay the entire tax. Such payment could be dictated by several consideration, including the cutting off of interest, but the most important one is that under the law as it existed prior to 1924 the Commissioner had full power at any time after making the assessment to enforce collection of the tax by summary proceedings. This would be an objectionable method to any taxpayer so anyone who was in financial position to do so would prefer to make his own arrangements for the raising of the cash necessary to make the payment. But those considerations would apply without reference to the question as to whether suit could be filed for part of the tax. If anyone of financial means sought to obtain a declaration of tax liability by payment of part of the tax and suit to recover, the Commissioner would not be long in bringing about the collection of the balance of the tax. Therefore, in either event the hardship existed.

The Congress, therefore, in recognizing the existence of a hardship because of the lack of appeal prior to collection of the tax, was merely considering the practical situation and seeking to relieve the hardship resulting in the ordinary case. There is nothing in that action constituting a legislative construction of the statute as contended for by the government in this case.

CONCLUSION

The statute conferring jurisdiction appears plain. It allows suit in the District Court or the Court of Claims to recover "any internal revenue tax alleged to have been erroneously or illegally assessed or collected." It allows such suit to recover "any sum alleged to have been excessive or in any manner wrongfully collected under the internal revenue laws." We see no reason to construe this grant of jurisdiction with an adverse eye. The majority of the court in the *Bushmiaer* case considered it "positive, plain and unambiguous." We see no reason for this Court to differ from that interpretation and for these reasons submit that this petition for writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner.

APPENDIX

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 5502 — May Term, 1957.

Walter W. Flora, Appellant, vs. United States of America, Appellee.	Appeal from the United States District Court for the District of Wyoming.

[Filed July 1, 1957.]

A. G. McClintock for Appellant.

John N. Stull (Charles K. Rice, Assistant Attorney General, A. F. Prescott and David O. Walter, Attorneys, Department of Justice, and John F. Raper, Jr., United States Attorney, were with him on the brief) for Appellee.

Before PHILLIPS, PICKETT and LEWIS, Circuit Judges.

LEWIS, Circuit Judge.

By complaint filed in the United States District Court for the District of Wyoming, plaintiff Flora[1] sought recovery of the sum of $5,058.54 paid to the government in partial satisfaction of a deficiency personal income tax assessment for the year 1950 in the amount of $27,251.13.

[1]Hereinafter called the taxpayer.

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Taxpayer alleged the deficiency to be erroneously assessed and the payment to be illegally collected because of a determination by the Commissioner of Internal Revenue that certain losses occurring to the taxpayer during the tax period and reported by him as ordinary losses were properly capital losses within the meaning of that term as defined by sec. 117(a)(1) of the Internal Revenue Code of 1939.

Jurisdiction is alleged to exist under the provisions of 28 U.S.C.A. 1346.[2] Responding to the complaint, the government alleged that the action could not be maintained in the District Court because the entire amount of the assessment had not been paid and, without waiving this special defense, counterclaimed for the unpaid balance. The District Court denied the special defense[3] but entered judgment upon the merits for the government on its counterclaim.

We are of the opinion that determination of a single question is dispositive of the case: Can a taxpayer maintain a personal income tax refund suit in the District Court without first paying the entire amount of the tax assessed for the period in question?

---

[2] Section 1346 provides, in part:

"(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of: (1) (As amended by Sec. 1, Act of July 30, 1954, c. 648, 68 Stat. 589) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or, in any manner wrongfully collected under the internal-revenue laws *, * *."

[3] 142 F. Supp. 602. The trial judge, although indicating he thought the defense meritorious, deemed it better practice to reserve the question for this court in view of what he considered a conflict between the circuits. See Suhr v. U.S., (3 Cir.) 18 F. 2d 81; Bushmiaer v. U.S. (8 Cir.) 230 F. 2d 146.

Beginning with the comments of Mr. Justice Miller in Cheatham v. United States, 92 U.S. 85, 23 L. Ed. 561, and continuing through many decision,[4] the Supreme Court has consistently indicated that full payment of a tax deficiency is a prerequisite to a judicial claim for refund. And such has been the established policy of our tax system.[5]

In 1924, Congress, recognizing both the desirability of maintaining a minimum of judicial interference with the collection of taxes and the concomitant hardship imposed on taxpayers by an inflexible "pay first, litigate later" rule, established the Board of Tax Appeals (now the United States Tax Court) as a place where the validity of a tax assessment could be initially questioned. In creating the Board of Tax Appeals the House Committee on Ways and Means stated:

> "(H. Rep. No. 179, 68th Cong., 1st Sess., pp. 7-8 (1939) 1 Cum. Bull. (Part 2) 241, 246-247):
>
> "The committee recommends the establishment of a Board of Tax Appeals to which a taxpayer may appeal prior to the payment of an additional assessment of income, excess-profits, war-profits, or estate taxes. Although a taxpayer may, *after payment of his tax*, bring suit for the recovery thereof and thus secure a judicial determination of the questions involved, he cannot, in view of section 3224 of the Revised Statutes, which prohibits suits to enjoin the collection of taxes,

[4] Savings Institution v. Blair, 116 U.S. 200, 6 S. Ct. 353, 29 L. Ed. 657; Dodge v. Osborn, 240 U.S. 118, 36 S. Ct. 275, 60 L. Ed. 557; Graham v. Dupont, 262 U.S. 234, 43 S. Ct. 567, 67 L. Ed. 965; Phillips v. Commissioner, 283 U.S. 589, 51 S. Ct. 608, 75 L. Ed. 1289; United States v. Jefferson Electric Co., 291 U.S. 386, 54 S. Ct. 443, 78 L. Ed. 859; Dobson v. Commissioner, 320 U. S. 489, 64 S. Ct. 239, 88 L. Ed. 248.

[5] For a discussion of the historical development of this policy see the opinion of Woodrough, Circuit Judge, dissenting in Bushmiaer v. United States, supra.

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secure such a determination prior to the payment of the tax. The right to appeal after payment of the tax is an incomplete remedy, and does little to remove the hardship occasioned by an incorrect assessment. The payment of a large additional tax on income received several years previous and which may have, since its receipt, been either wiped out by subsequent losses, invested in non-liquid assets, or spent, sometimes forces taxpayers into bankruptcy, and often causes great financial hardship and sacrifice. The results are not remedied by permitting the taxpayer to sue for the recovery of the tax after this payment. He is entitled to an appeal and to a determination of his liability for the tax prior to its payment." (Emphasis supplied.)

Since the establishment of the tax court the distinctive purpose of its creation has been judicially recognized and its intended powers guarded. In Old Colony Trust Co. v. Commissioner, 279 U.S. 716, 721, 49 S. Ct. 499, 73 L. Ed. 918, the Supreme Court stated:

"The Board of Tax Appeals, established by sec. 900 of the Revenue Act of 1924, Tit. IX, c. 234, 43 Stat. 253, 336, was created by Congress to provide taxpayers an opportunity to secure an independent review of the Commissioner of Internal Revenue's determination of additional income and estate taxes by the Board in advance of their paying the tax found by the Commissioner to be due. Before the Act of 1924 the taxpayer could only contest the Commissioner's determination of the amount of tax after its payment."

And in Dobson v. Commissioner, supra, the court stated:

"Congress has invested the tax court with primary

IN THE

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October Term, 1956

No. .....

WALTER W. FLORA, PETITIONER,

vs.

THE UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above cause on July 1, 1957.

Opinions Below

The opinion of the Court of Appeals is not yet reported in the Federal Reporter. It is reprinted as part of the appendix. The opinion of the district court is reported in 142 F. Supp. 602 and is also set forth in the record, pages 12 to 18.

authority for redetermining deficiencies, which constitutes the greater part of the tax litigation. This requires it to consider both law and facts. Whatever latitude exists in resolving questions such as those of proper accounting, treating a series of transactions as one for tax purposes, or treating apparently separate ones as single in their tax consequences, exists in the tax court and not in the regular courts."

In view of such consistent statements of the Supreme Court and the actual wording of sec. 7422 of the Internal Revenue Code of 1954[6] we are not impressed with the argument that the instant suit is but a claim for refund for an amount of tax actually paid and does not include a review of the total assessment or the remaining deficiency not paid. Such approach is unrealistic and serves only to conveniently defeat the established purpose and function of the tax court.

Taxpayer's complaint wherein it affirmatively appeared that only a partial payment upon a deficiency assessment had been made failed to state a claim. The government, apparently content with the deficiency assessment, does not contend that its judgment upon counterclaim should be sustained independently.

The cause is remanded to the District Court with directions to vacate the judgment of the government upon its counterclaim and to dismiss the action without prejudice.

---

[6] "Civil Actions for Refund.

(a) No Suit Prior to Filing Claim for Refund.

No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, * * *"

Jurisdiction

The judgment sought to be reviewed was rendered and entered on July 1, 1957. No petition for rehearing has been filed nor has the petitioner applied for an order extending the time within which to petition for certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254(1).

Question Presented

Whether the United States District Court has jurisdiction of a tax refund suit when the taxpayer has not paid his entire income tax for the taxable year involved.

Statutes and Constitutional Provisions Involved

28 U.S.C. sec. 1346 (as amended by Sec. 1 of Act of July 30, 1954, c. 648, 68 Stat. 589), insofar as pertinent, provides as follows:

"Sec. 1346. *United States as defendant.*

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal revenue laws; * * *"

Section 7422(a) of the Internal Revenue Code of 1954, (Act of August 16, 1954, c. 736, 68A Stat. 876), provides in part that:

"No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax

alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the secretary or his delegate. * * *"

Statement

Petitioner suffered losses in transactions involving the purchase and sale of commodities and commodity futures during the year 1950. These losses were reported as ordinary losses but this was disallowed by the Internal Revenue Service, resulting in an addition to the income of petitioner of $42,608.05 and additional tax, plus interest, in the amount of $28,908.60. A later assessment was made of a penalty of $45, plus interest. Petitioner paid a total of $5,058.54 on these assessments and filed a claim for refund. Upon its disallowance this suit followed. (R. 20-21) The United States counterclaimed for the balance of the deficiency. (R. 9-10)

The United States included in its answer a defense that the court was without jurisdiction of the cause since petitioner had not paid the entire amount of income taxes for 1950. This defense was heard separately prior to trial and overruled. (R. 11) In its opinion of July 24, 1956, the court reviewed this question (R. 13-15) and stated that the petitioner should not maintain the suit since he had not paid the entire tax assessment. (R. 15) However, in view of what the court considered a conflict between decisions of the Third and Eighth Circuits and since the Court of Appeals for the Tenth Circuit had not passed on the question, it considered the merits of the case. Findings and conclusions were entered in favor of the United States upon both the complaint and counter-

claim (R. 18-21) and judgment was entered against the taxpayer and in favor of the United States on its counterclaim. (R. 21-22)

Jurisdiction of the United States District Court in the first instance is predicated upon section 1346 of 28 U.S.C., and it is contended that the suit is one to recover an internal revenue tax erroneously and illegally assessed and collected, or a sum of money which was wrongfully collected under the internal revenue laws. The Court of Appeals rejected this contention and held that the District Court was without jurisdiction and remanded the cause with directions to vacate the judgment for the government upon its counterclaim and to dismiss the action without prejudice.

Reasons Relied on for Allowance of Writ

The decision of the court below denies to the taxpayer the right to resort to the District Court of his residence for redress for income tax assessments claimed to have been erroneously or illegally assessed and collected unless the taxpayer can pay and has paid the full amount of the tax assessed. While the principle of immunity is not denied, where that immunity has been waived the amenability of the sovereign to suit in courts readily available to the citizen is of the utmost importance and if this right is to be denied it should only be because of the clear lack of statutory authority. The decision below should therefore be reviewed because it presents a jurisdictional question of general importance and is clearly in conflict with the decisions of other courts of appeal.

1.

The decision sought to be reviewed is in direct conflict with the recent decision of the Court of Appeals for the Eighth Circuit in *Buslimiaer v. United States*, 230 F. 2d 146. In that case, exactly as in this, the taxpayer had paid a part only of the deficiency assessment against him, then filed claim for refund of the amount so paid and upon its rejection filed suit in the District Court for the amount so paid. The District Court dismissed the suit for want of jurisdiction. The Court of Appeals reversed, one judge dissenting, saying:

> (p. 149). "In view of the positive, plain and unambiguous provisions of the Tucker Act as amended in 1954 we cannot escape the conviction that the District Court had jurisdiction of the present action. * * *
>
> "* * * In the final analysis the ultimate question requiring determination in the instant case is whether plaintiffs regardless of how exhorbitant, unjust or illegal the additional assessment might be are required to pay the full amount of such assessment as a condition precedent to the right to invoke the jurisdiction of the District Court in an action to recover a refund. * * * *"

The decision is also in conflict with the plain language of the decision of the Court of Appeals of the Second Circuit in the case of *Coates v. United States*, 111 F. 2d 609. In that case plaintiff started his action without payment of the full tax but prior to its determination had paid the full amount. The government urged lack of jurisdiction because the full amount had not bee paid when the suit was brought.

Perhaps it was not necessary for the Court of Appeals to dispose of it on the ground it did but notwithstanding

the payment of the full tax the government was still asserting lack of jurisdiction. The court said:

> (p. 610) "It is pressing technicality beyond all bounds to say that a taxpayer who has made a return on an excessive basis and has paid installments which are more than the correct amount of tax before discovering his error, must pay the remaining installments indicated by the incorrect return on pain of losing his remedy to recover overpayment. The proposition has neither reason nor authority in its favor. We reject the jurisdictional point and pass on to the merits."

2.

The decision of the court below improperly construes previous decisions of this Court. On page 2 of the opinion we find this statement:

> "Beginning with the comments of Mr. Justice Miller in *Cheatham v. United States*, 92 U. S. 85, 23 L. Ed. 561, and continuing through many decisions, the Supreme Court has consistently indicated that *full* payment of a tax deficiency is a prerequisite to a judicial claim for refund. And such has been the established policy of our tax system." (Emphasis added)

It is respectfully submitted that at no time has this Court had before it for consideration the question as to whether the full tax as assessed must be paid. In the *Cheatham* case the full tax had been paid and the question before the court was only as to the time when limitations began to run against the maintenance of the suit to recover. Of the other cases cited by the court below, *Savings Institution v. Blair*, 116 U. S. 200, held that suit to recover could not be brought unless claim therefor had been filed within time fixed by law and *Dodge v. Osborn*,

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BRIEF FOR WALTER W. FLORA, PETITIONER

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October Term, 1957

No. 492

WALTER W. FLORA, PETITIONER,

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THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE TENTH CIRCUIT

A. G. McCLINTOCK,
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Counsel for Petitioner.

240 U. S. 118, and *Graham v. DuPont*, 262 U. S. 234, held that injunction against collection of the tax would not lie. *United States v. Jefferson Electric Co.*, 291 U. S. 386, was a suit to recover and there was no question but that the full amount had been paid. *Dobson v. Commissioner*, 320 U. S. 489, had come up through the Tax Court so no question of the amount of payment was involved.

Phillips v. Commissioner, 283 U. S. 589, points out that two methods are available to the taxpayer in only one of which, appeal to the Tax Court, may the taxpayer avoid summary proceedings to collect the tax and even in such case the Commissioner may make jeopardy assessment and collect by distraint unless the taxpayer filed a bond. Of the tax payment method the court says:

> "He may contest his liability by bringing an action, either against the United States or the Collector to recover the *amount* paid." (Emphasis added)

This case is also interesting in pointing out in a note, p. 596, that by the establishment of the Tax Court, "the paramount right of the United States to require immediate payment, or surety therefor, is not diminished."

The case of *Suhr v. United States*, 18 F. 2d 81 (CA 3), was considered by the District Judge to be in conflict with the *Bushmiaer* case. In that case we find the following statement:

> "None of the various tax acts provide for recourse to the courts by a taxpayer until he has failed to get relief from the proper administrative body or has paid all the taxes assessed against him. The payment of a part does not confer jurisdiction upon the courts. *Blair v. Birkenstock*, supra."

Blair v. Birkenstock, 271 U. S. 348, cited as authority

for the proposition stated, does not sustain the point. The only question in the case was the date from which and to which interest should be allowed.

3.

Both Congressional enactments and decisions of this Court express the doctrine that injunction against the collection of a tax will not be permitted nor may the taxpayer secure a declaratory judgment as to his liability to pay a deficiency assessment. Implicit in the decision of the court below is a strong feeling that the maintenance of a suit of this kind, without full payment of the tax, is a method of obtaining a judicial determination of the liability without having made payment and therefore an evasion of the rule that courts will not interfere with the collection of taxes in the first instance. The court is of the view that contest before payment can be allowed only by strict adherence to the procedure permitting appeal to the Tax Court.

As has been held by this Court, *Phillips v. Commissioner*, supra, the only way in which the taxpayer can avoid summary proceedings to collect the tax assessed against him, however, illegal it may be, is by appeal to the Tax Court. The deficiency assessment in this case was made March 10, 1952, and the right of appeal to the Tax Court expired 90 days thereafter. The two payments made by petitioner were in March and June of 1953 and suit to recover was filed August 3, 1956. (R. 3-4) When petitioner failed to take appeal from the Commissioner's decision he subjected himself to summary proceedings to collect the deficiency. This situation has continued since June of 1952.

It is apparent therefore that not one thing the taxpayer has done in this case has operated to thwart the government in the admittedly important function of tax

collection. Unless it might be his lacking funds or property with which to pay the tax, the taxpayer has done nothing in any way seeking to limit the right of the government to enforce its tax claim. The filing of this suit could not so operate and if during the pendency thereof the government sought to enforce its collection rights in a summary way, no legal remedy could have issued from the District Court restraining or interfering with that collection.

On the other hand, if petitioner in this case is without remedy by suit to recover the part of the tax that he has paid, there exists a field where the taxpayer is denied access to the regularly constituted courts of general jurisdiction. A taxpayer without funds to pay the entire tax and without the financial standing to procure a bond might take an appeal to the Tax Court without paying the tax (subject always to possible jeopardy assessment) but his right to appeal to the Court of Appeals to secure a review of the assessment is subject to posting a bond. Sec. 7485. Int. Rev. Code 1954, 26 U.S.C.A. sec. 7485. The financially hard pressed taxpayer is therefore effectively denied a complete remedy permitted a taxpayer in good financial condition. Moreover, a taxpayer who has not discovered the possible illegality or error of the imposed deficiency until he has made some payment or after time for appeal to the Tax Court has expired and who does not have the funds with which to pay the whole tax will find himself completely without redress and without the means of recovering the amount illegally exacted from him.

It is not intended by this discussion to inject any issue of lack of due process in the assessment of the tax. But if there is one construction of the statute that permits the government to collect its taxes without interference and at the same time preserves a complete right to litigate

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BRIEF FOR WALTER W. FLORA, PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals (R. 14-18) is reported in 246 F. 2d 929. The memorandum of the trial judge (R. 6-9) is reported in 142 F. Supp. 602.

JURISDICTION

The judgment of the Court of Appeals was entered July 1, 1957 (R. 18). On November 25, 1957 order granting the petition for certiorari was entered and the case transferred to the summary calendar. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254(1).

QUESTION PRESENTED

Whether the United States District Court has jurisdiction of a tax refund suit when the taxpayer has not paid his entire income tax for the year involved as assessed by the Commissioner of Internal Revenue.

STATUTES INVOLVED

28 U.S.C. sec. 1346 (as amended by Sec. 1 of Act of July 30, 1954, c. 648, 68 Stat. 589), insofar as pertinent, provides as follows:

> Sec. 1346. *United States as defendant*
>
> (a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:
>
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Section 7422(a) of the Internal Revenue Code of 1954, (Act of August 16, 1954, c. 736, 68A Stat. 876), provides in part that:

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THE UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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SUTHERLAND, ASBILL & BRENNAN.

STATEMENT

Petitioner suffered losses in transactions involving the purchase and sale of commodities and commodity futures during the year 1950. These losses were reported as ordinary losses but this was disallowed by the Internal Revenue Service, resulting in an addition to the income of petitioner of $42,608.05 and additional tax, plus interest, in the amount of $28,908.60. A later assessment was made of a penalty of $45, plus interest. Petitioner paid a total of $5,058.54 on these assessments and filed a claim for refund. Upon its disallowance this suit followed. (R. 1-4)

The United States included in its answer a defense that the court was without jurisdiction of the cause since petitioner had not paid the entire amount of income taxes for 1950. This defense was heard separately prior to trial and overruled. (R. 5) In its opinion of July 24, 1956, the court reviewed this question (R. 6-9) and stated that the petitioner should not maintain the suit since he had not paid the entire tax assessment. (R. 9) However, in view of what the court considered a conflict between decisions of the Third and Eighth Circuits and since the Court of Appeals for the Tenth Circuit has not passed on the question, it considered the merits of the case. Findings and conclusions were entered in favor of the United States upon both the complaint and counterclaim (R. 9-12) and judgment was entered against the taxpayer and in favor of the United States on its counterclaim. (R. 12-13)

Jurisdiction of the United States District Court in the first instance is predicated upon section 1346 of 28 U.S.C., and it is contended that the suit is one to recover an internal revenue tax erroneously and illegally assessed and collected, or a sum of money which was wrongfully collected under the internal revenue laws. The Court of

Appeals rejected this contention and held that the District Court was without jurisdiction and remanded the cause with directions to vacate the judgment for the government upon its counterclaim and to dismiss the action without prejudice. (R. 18-19).

SUMMARY OF ARGUMENT

The decision attacked in this Court holds that before a taxpayer may bring a suit in the district court to recover taxes alleged to have been erroneously or wrongfully assessed or collected he must have paid the whole tax as assessed. We submit that this decision is erroneous for the following reasons:

I. The decision is contrary to the plain provisions of the applicable statutes. The statute specifically says that an action may be maintained for any tax or any sum. The effect of the decision of the court below is to read something into the statute that is not there upon any reasonable construction thereof.

II. The decision is based upon an erroneous and improper interpretation of the previous decisions of this Court. This Court has not had before it the question as to whether it is necessary to pay the full amount of the assessed tax before suit can be maintained in the district courts to recover an amount paid and claimed to have been erroneously and wrongfully assessed and collected. The question is therefore one of first impression.

III. The applicable statutes should be given a liberal interpretation in favor of the taxpayer. Insofar as it is consistent with governmental policy and proper enforcement of the internal revenue laws, statutes rendering the sovereign amenable to suits in courts of general jurisdiction readily accessible to the citizen should receive a liberal construction to the end that judicial review of administra-

tive action be a real right and not a mere fiction, available to the small taxpayer as well as the large.

IV. The enactment of the statute creating a right of appeal to the Tax Court without payment of the tax and the legislative history of that law do not require the restrictive interpretation upon the statutory right of suit placed upon such right by the court below. Hardships recognized as the basis for the creation of such additional remedy existed as much under our construction of the laws as under the government's.

ARGUMENT

I

The decision is contrary to the plain provisions of applicable statutes

There is nothing in the provisions of Section 1346(a)(1) which states that a suit can be maintained in the district court only if the whole tax as assessed has been paid. The statute permits suit for the recovery of "any internal-revenue tax alleged to have been erroneously or illegally assessed or collected," or "any sum alleged to have been excessive or in any manner wrongfully collected under the internal revenue laws." If a taxpayer, under threat of summary proceedings to collect a tax, has paid a part thereof, it seems rather plainly to follow that the amount so paid represents either a tax or a sum wrongfully, erroneously or illegally assessed if there was no legal basis for the assessment. It would have been an easy matter for Congress, if it considered that payment of the whole tax as assessed was a prerequisite to suit, to have said so plainly. The court below has therefore read something into the statute that was not placed there by Congress.

The decision of the court below is in direct conflict

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with the recent decision of the Court of Appeals for the Eighth Circuit in *Bushmiaer v. United States*, 230 F. 2d. 146. In that case, exactly as in this, the taxpayer had paid a part only of the deficiency assessment against him, then filed claim for refund of the amount so paid and upon its rejection filed suit in the District Court for the amount so paid. The District Court dismissed the suit for want of jurisdiction. The Court of Appeals reversed, one judge dissenting, saying:

> (p. 149) "In view of the positive, plain and unambiguous provisions of the Tucker Act as amended in 1954 we cannot escape the conviction that the District Court had jurisdiction of the present action. * * *
>
> "* * * In the final analysis the ultimate question requiring determination in the instant case is whether plaintiffs regardless of how exhorbitant, unjust or illegal the additional assessment might be are required to pay the full amount of such assessment as a condition precedent to the right to invoke the jurisdiction of the District Court in an action to recover a refund. * * * *"

The decision is also in conflict with the plain language of the decision of the Court of Appeals of the Second Circuit in the case of *Coates v. United States*, 111 F. 2d 609. In that case plaintiff started his action without payment of the full tax but prior to its determination had paid the full amount. The government urged lack of jurisdiction because the full amount had not been paid when the suit was brought.

Perhaps it was not necessary for the Court of Appeals to dispose of it on the ground it did but notwithstanding the payment of the full tax the government was still asserting lack of jurisdiction. The court said:

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(p. 610) "It is pressing technicality beyond all bounds to say that a taxpayer who has made a return on an excessive basis and has paid installments which are more than the correct amount of tax before discovering his error, must pay the remaining installments indicated by the incorrect return on pain of losing his remedy to recover overpayment. The proposition has neither reason nor authority in its favor. We reject the jurisdictional point and pass on to the merits."

II

The decision is based upon an erroneous and improper interpretation of previous decisions of this Court

On page 2 of the opinion, 246 F. 2d 930, we find this statement:

"Beginning with the comments of Mr. Justice Miller in *Cheatham v. United States*, 92 U. S. 85, 23 L. Ed. 561, and continuing through many decisions, the Supreme Court has consistently indicated that *full* payment of a tax deficiency is a prerequisite to a judicial claim for refund. And such has been the established policy of our tax system." (Emphasis added)

It is respectfully submitted that at no time has this Court had before it for consideration the question as to whether the full tax as assessed must be paid. In the *Cheatham* case the full tax had been paid and the question before the court was only as to the time when limitations began to run against the maintenance of the suit to recover. Of the other cases cited by the court below, *Savings Institution v. Blair*, 116 U. S. 200, held that suit to recover could not be brought unless claim therefor had been filed within time fixed by law and *Dodge v. Osborn*, 240 U. S. 118, and *Graham v. DuPont*, 262 U. S. 234, held that injunction against collection of the tax would not lie. *United States v. Jefferson Electric Co.*, 291 U. S. 386, was a suit

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Brodsky, *Tax Refunds and How to Obtain Them* 13-14 (Prentice-Hall 1955)	10

to recover and there was no question but that the full amount had been paid. *Dobson v. Commissioner*, 320 U. S. 489, had come up through the Tax Court so no question of the amount of payment was involved.

Phillips v. Commissioner, 283 U. S. 589, points out that two methods are available to the taxpayer in only one of which, appeal to the Tax Court, may the taxpayer avoid summary proceedings to collect the tax and even in such case the Commissioner may make jeopardy assessment and collect by distraint unless the taxpayer filed a bond. Of the tax payment method the court says:

> "He may contest his liability by bringing an action, either against the United States or the Collector to recover the *amount* paid." (Emphasis added)

This case is also interesting in pointing out in a note, p. 596, that by the establishment of the Tax Court, "the paramount right of the United States to require immediate payment, or surety therefor, is not diminished."

The case of *Sulix v. United States*, 18 F. 2d 81 (CA 3), was considered by the District Judge to be in conflict with the *Bushmiaer* case. In that case we find the following statement:

> "None of the various tax acts provide for recourse to the courts by a taxpayer until he has failed to get relief from the proper administrative body or has paid all the taxes assessed against him. The payment of a part does not confer jurisdiction upon the courts. *Blair v. Birkenstock*, supra."

Blair v. Birkenstock, 271 U. S. 348, cited as authority for the proposition stated, does not sustain the point. The only question in the case was the date from which and to which interest should be allowed.

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Brown, *Refund Suits Against Collectors*, 28 Taxes 937 (1950)	11
3 Casey, *Federal Tax Practice* § 11.5 (1955)	10
54 Harv. L. Rev. 1404 (1941)	11
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3 Rabkin and Johnsan, *Federal Income, Gift and Estate Taxation* § 72.04(6)	10
S. Rep. No. 1622, 83d Cong., 2d Sess. 610-11 (1954)	13

III

The applicable statutes should be given a liberal interpretation in favor of the taxpayer

Both Congressional enactments and decisions of this Court express the doctrine that injunction against the collection of a tax will not be permitted nor may the taxpayer secure a declaratory judgment as to his liability to pay a deficiency assessment. Implicit in the decision of the court below is a strong feeling that the maintenance of a suit of this kind, without full payment of the tax, is a method of obtaining a judicial determination of the liability without having made payment and therefore an evasion of the rule that courts will not interfere with the collection of taxes in the first instance. The court is of the view that contest before payment can be allowed only by strict adherence to the procedure permitting appeal to the Tax Court.

As has been held by this Court, *Phillips v. Commissioner*, supra, the only way in which the taxpayer can avoid summary proceedings to collect the tax assessed against him, however, illegal it may be, is by appeal to the Tax Court. The deficiency assessment in this case was made March 10, 1952, and the right of appeal to the Tax Court expired 90 days thereafter. The two payments made by petitioner were in March and June of 1953 and suit to recover was filed August 3, 1956. (R. 3-4). When petitioner failed to take appeal from the Commissioner's decision he subjected himself to summary proceedings to collect the deficiency. This situation has continued since June of 1952.

It is apparent therefore that not one thing the taxpayer has done in this case has operated to thwart the government in the admittedly important function of tax collection. Unless it might be a lack of funds or property

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 492

WALTER W. FLORA,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

Introduction

The words of the jurisdictional statute in question are broad and all-inclusive. The Government admits that their "literal meaning" authorizes the present suit (Br. 8).

The taxpayer filed a claim for refund in accordance with the law and regulations. Upon its rejection, he had two years within which to sue, and he brought suit within such period. The Government would have this Court hold that the suit was premature. If the suit were brought more than two years after rejection, it would clearly be too late.

with which to pay the tax, the taxpayer has done nothing in any way seeking to limit the right of the government to enforce its tax claim. The filing of this suit could not so operate and if during the pendency thereof the government sought to enforce its collection rights in a summary way, no legal remedy could have issued from the District Court restraining or interfering with that collection.

On the other hand, if petitioner in this case is without remedy by suit to recover the part of the tax that he has paid, there exists a field where the taxpayer is denied access to the regularly constituted courts of general jurisdiction. A taxpayer without funds to pay the entire tax and without the financial standing to procure a bond might take an appeal to the Tax Court without paying the tax (subject always to possible jeopardy assessment) but his right to appeal to the Court of Appeals to secure a review of the assessment is subject to posting a bond. Sec. 7485 Int. Rev. Code 1954, 26 U.S.C.A. sec. 7485. The financially hard pressed taxpayer, is therefore effectively denied a complete remedy permitted a taxpayer in good financial condition. Moreover, a taxpayer who has not discovered the possible illegality or error of the imposed deficiency until he has made some payment or after time for appeal to the Tax Court has expired and who does not have the funds with which to pay the whole tax will find himself completely without redress and without the means of recovering the amount illegally exacted from him.

It is not intended by this discussion to inject any issue of lack of due process in the assessment of the tax. But if there is one construction of the statute that permits the government to collect its taxes without interference and at the same time preserves a complete right to litigate the issue and take an appeal in accordance with general legal principles, that construction certainly should be favored

To support the decision below, the Government would read into related statutes an intent on the part of Congress to provide with respect to the same cause of action both that the taxpayer may not sue and that he must sue to prevent the statute from running against him.

The Government's entire argument is grounded upon unsupportable assumptions that maintenance of the present suit in some way restrains collection of the balance of the assessment. It relies upon general statements by this Court which do not refer even remotely to the issue involved in this case. It disregards long-standing decisions squarely upholding jurisdiction in such cases. It, moreover, completely misinterprets the significance of Section 7422(e) of the Internal Revenue Code of 1954, which recognizes that a taxpayer may maintain a suit for refund of tax where it results in adjudication of the Commissioner's claim for an unpaid deficiency.

ARGUMENT

1. In urging this Court to depart from the literal meaning of the jurisdictional statute, the Government overlooks the import of the related statutory provisions regarding refunds.

The Government admits that the literal meaning of the terms of the statute supports jurisdiction in this case. 28 U.S.C. § 1346(a), as amended, 68 Stat. 689 (1954). It urges, nevertheless, that petitioner disregards "the settled and salutary rule that the literal meaning of statutory words yields to legislative policy and purpose" (Br. 8).[1]

[1] Regarding statutory construction, this Court stated in *United States v. Sullivan*, 332 U.S. 689, 693: "And none of the foregoing cases, nor any other on which they relied, authorizes a court in interpreting a statute to depart from its clear meaning." See also *United States v. Emery, Bird, Thayer Realty Co.*, 237 U. S. 28, 32, as quoted in taxpayer's original brief (Br. 11).

over one that will result in a drastic limitation of the taxpayer's remedies. Mr. Justice Holmes, in *United States v. Emery Bird, Thayer Realty Company*, 237 U. S. 28, rejected an argument concerning jurisdiction resting upon the "inadmissible premise that the great act of justice embodied in the jurisdiction of the court of claims is to be construed strictly and read with an adverse eye." This Court, in *United States v. Shaw*, 309 U. S. 495, 501 has said:

> "As representative governments attempt to ameliorate inequalities as necessities will permit, prerogatives of the government yield to the needs of the citizen . . . When authority is given, it is liberally construed."

Unless, therefore, there are considerations of the greatest weight dictating such adverse construction, the construction given the statute by this Court should be liberal. Practical considerations and taxing policy were advanced to the court in the case of *Hanchett v. Shaughnessy*, (D.C.N.D.N.Y.), 126 F. Supp. 770, as the basis for denying jurisdiction in an essentially similar situation. Reference was made to section 3772 of Title 26 of the Code, (now section 7422 of the Internal Revenue Code, quoted above and in the opinion of the court below) and it was contended that that statute required payment of the full amount of tax before the action could be brought. The court held that the conditions were concerned with the filing of the claim rather than the payment of the tax, upon which the right to maintain the action depends.

> "The section by its language contemplates an action to recover '* * * any sum alleged to have been excessive or in any manner wrongfully collected. * * *' The cause of action would seem to have ripened when 'any sum' has been wrongfully collected. Its maintenance is deferred until the prescribed conditions are met."

The Government had no choice but to admit that the provisions of Section 1346(a) on their face are plain and clear. The language of the statute is broad and all-inclusive in describing the action as one for the recovery of "any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, . . . or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws . . . ." It is difficult to conceive of language that might be added to broaden this description. The argument that these words mean "the entire deficiency" (Br. 8, 20) misconceives the nature of a suit for refund which is brought to recover, not a deficiency, but an *overpayment* of tax. The question whether there is an unpaid deficiency or an overpayment of tax "involves the merits, not the jurisdiction." *Coates* v. *United States*, 111 F. 2d 609, 610 (2d Cir.).

Despite its assertion that the precise question involves a construction of the terms "any internal-revenue tax" and "any sum," the Government itself points out that this particular language was added to the statute in 1921 in an amendment which removed the $10,000 jurisdictional limitation from tax cases where the Collector was dead and admits that this amendment was not intended to make any other change (Br. 10). Prior to the 1921 amendment, the jurisdiction of district courts in tax cases rested upon the general authorization in the Tucker Act extending to "all claims . . . founded upon the Constitution of the United States or any law of Congress . . . ."[2] Since the statute prior to 1921 obviously contained no restrictions of the sort urged by the Government, and the 1921 amendment admittedly was intended to add none, it is appropriate

[2] Tucker Act §§ 1, 2, 24 Stat. 505 (1887), as amended by Judicial Code § 24, 36 Stat. 1087 (1911). *United States* v. *Emery, Bird, Thayer Realty Co.*, *supra*.

This decision reads the statute as a whole and gives effect to it as a whole. We can see no reason why this Court should not give a similarly liberal construction to the grant of jurisdiction to the district courts. No important policy of government will thereby be jeopardized and there will be no interference with the important function of tax collection. Such interference can not follow because, regardless of the pendency of a suit of this kind, the Commissioner still has the power of summary collection of the tax.

IV

The enactment of the statute giving the right of appeal to the Tax Court does not require the restrictive interpretation placed on the right of suit in the district court imposed by the court below

The court below was strongly impressed with the government's argument that the enactment of legislation creating the Board of Tax Appeals, now the Tax Court, demonstrates that Congress considered payment of the *whole* tax a necessary prerequisite to the commencement of suit for refund. Reference is made to reports of the Congressional committees considering the legislation (246 F. 2d 931), which emphasized the hardship to the taxpayer under existing law and the necessity for a procedure that would permit an appeal and review of the Commissioner's action before payment of the tax. The government and court argue that Congress found that the taxpayer was placed in an inequitable position by the doctrine of payment before litigation. It is then argued that no hardship or inequity would have existed if a part payment could be made and suit to recover that part payment then instituted. From these two premises it is concluded that Congress has considered that there was no right to resort to the district court unless the entire tax had been paid.

to ask the Government when and by what statute did Congress impose these restrictions on jurisdiction.

Certainly restrictions on jurisdiction of the sort urged by the Government could not be found in Section 7422(a) of the Internal Revenue Code of 1954,[3] which merely sets out the requirement that a claim must be filed as a condition to bringing suit. As a matter of fact, Section 7422(a) and the other provisions of the Internal Revenue Code of 1954 setting out the procedures regarding claims for refund and the statutory prerequisites to suit clearly reflect a Congressional intent that the words of the jurisdictional statute be given their plain and literal meaning.[4]

Section 7422(a) provides that no suit "for the recovery of any internal revenue tax . . . , or of any sum alleged to have been excessive . . ." may be brought until a claim for refund has been duly filed in accordance with the law and regulations. The undeniable tie between *the claim* and *the suit* is emphasized by the fact that the suit is confined to the grounds set out in the claim.[5]

The claim contemplated by Section 7422(a) is one filed in accordance with the provisions of Section 6511 in which it is made doubly clear that no payment can be refunded unless a claim is filed within the prescribed statutory period—in this case within two years from the date of payment. Thus, Section 6511 requires the filing of a claim for refund of a partial payment in order to avoid the bar of the statute. Where such claim for refund is rejected, Section 6532(a)(1) bars recovery of the payment in any suit brought more than two years from rejection.

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[3] Derived from Rev. Stat. § 3226 (1875).

[4] Int. Rev. Code of 1954, §§ 6511(a), (b), 6532(a)(1), 7422(a), which are set forth in the Appendix, *infra*.

[5] U.S. Treas. Reg., § 301.6402-2 (1954); *United States* v. *Andrews*, 302 U.S. 517; *United States* v. *Garbutt Oil Co.*, 302 U.S. 528.

If by bringing a suit to recover a part payment the taxpayer could effectively stay the collection of the balance of the tax until after his suit had been determined, the second promise of the argument might be correct but in view of the admitted remedies open to the Commissioner for the collection of the tax, it is clear that this is not the case. Therefore, a taxpayer who had paid only a part of his tax could not effectively bar the complete collection thereof except by a lack of funds or property out of which to satisfy the obligation. In the usual case, then, the making of a token payment and suit to recover would not be a bar to collection and before the suit could be brought to a successful conclusion, the taxpayer might have been the victim of a forced sale of his property with all the same hardships mentioned by the committee in its report.

The practical situation that confronted Congress was therefore that in the usual case full payment of the tax was necessary in order to contest the liability and it was this usual case that concerned Congress and caused it to adopt the appeal provisions. There is no basis for the contention that Congress thereby demonstrated that no right of part payment and suit for recovery existed under the then applicable law. Congress, in recognizing the existence of a hardship because of the lack of appeal provisions prior to collection of the tax, was merely considering the practical situation and seeking to relieve the hardship resulting in the ordinary case. There is nothing in that action constituting a legislative construction of the statutes relating to suits to recover taxes.

A taxpayer requiring an extended time to pay an assessment must, if he considers any payment excessive, protect himself by filing a timely claim for refund of that particular payment. Upon the rejection of his claim, he has only two years within which to sue. If he were unable to pay the full assessment within this two year period, the Government's theory would forever bar him from recovering his earlier payment.[6]

The Government's departure from the plain language of the statute would attribute to Congress the intent on the one hand to deny this taxpayer the right to sue upon his claim for refund, and on the other hand to require him to sue within two years or be barred by the statute of limitations. Certainly, the literal meaning of a statute should not be disregarded where to do so produces such an incongruity. Having provided that this suit could not be brought after two years from rejection, Congress undeniably contemplated that it could be brought within such period.

2. There is no basis for the Government's repeated assumptions that this suit in some way restrains collection of the balance of the assessment.

The Government makes the surprising statement that the creation of the Board of Tax Appeals is "explainable only on the assumption that the taxpayer was obliged under the statutes authorizing refund suits to pay the entire tax before bringing suit for refund" (Br. 14). The Board of Tax Appeals (now the Tax Court) was created to permit restraint of assessment and collection of an asserted deficiency where

[6] See *Hanchett* v. *Shaughnessy*, 126 F. Supp. 769 (N.D.N.Y.), where a taxpayer made payments of $4100 on an assessment of $10,536.96, and arranged to pay the balance in monthly installments over a period of approximately six years. Claim for refund of the $4100 was filed and rejected, and suit was brought to recover that amount. Long before the last payment the statutory period for bringing suit to recover the first payments would have expired.

CONCLUSION

The statute conferring jurisdiction appears plain. It allows suit in the district court or court of claims to recover "any internal revenue tax alleged to have been erroneously or illegally assessed or collected." It allows such suit to recover "any sum alleged to have been excessive or in any manner wrongfully collected under the internal revenue laws." We see no reason for this Court to construe the statute in any way different from the majority of the court in the *Bushmiaer* case, where it was held to be "positive, plain and unambiguous." The court below has read something into the statute which Congress did not intend and has in part justified this by reference to a subsequent law creating a right of appeal before the tax becomes fixed. Such construction of the effect of this later law is not justified by its history and no reason exists why the law conferring jurisdiction upon the district courts should not be liberally interpreted to the end that the United States be readily accessible to suit by its citizens in courts convenient to those citizens.

We therefore submit that the United States District Court for the District of Wyoming did have jurisdiction of the cause and that the judgment of the United States Court of Appeals for the Tenth Circuit holding that the cause should be dismissed for lack of jurisdiction is erroneous and that this Court should reverse such judgment and remand the cause to the Court of Appeals with instructions to consider the appeal from the United States District Court upon the merits.

Respectfully submitted,

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any overpayment is implicit in certain earlier opinions of this Court (... 9-14). Not a single one of those opinions, however, contains the slightest suggestion that the Court was even remotely considering the case where part of the assessment had been paid.

Taxpayer's original brief discussed (Br. 7-8) the irrelevance of the statements in the following cases relied upon in the opinion below; *Cheatham* v. *United States* 92 U.S. 85; *Kings County Savings Institution* v. *Blair*, 116 U.S. 200; *Dodge* v. *Osborn*, 240 U.S. 118; *Graham* v. *Dupont*, 262 U.S. 234; *United States* v. *Jefferson Elec. Co.*, 291 U.S. 386; *Dobson* v. *Commissioner*, 320 U.S. 489; *Phillips* v. *Commissioner*, 283 U.S. 589.

Nothing in the additional cases cited by the Government supports its position. Taxpayer, of course, has no quarrel with the doctrine, "pay first and litigate later," enunciated in the concurring opinion in *Allen* v. *Regents*, 304 U.S. 439, 456; or the statement in *Bull* v. *United States*, 295 U.S. 247, 260, that "payment precedes defense";[8] or similar statements made in denying an injunction against collection of taxes in *Bailey* v. *George*, 259 U.S. 16. These statements do not deal with how much must be paid and in no way support the Government's inference that "the entire tax, and not merely a token amount, must be paid" (Br. 13). Taxpayer's position, moreover, is supported by the holding

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[8] The *Bull* case was an unfortunate selection for the Government, for in that case the Supreme Court said: "While here the money was taken through mistake without any element of fraud, the injust detention is immoral and amounts in law to a fraud on the taxpayer's rights. What was said in the State Nat. Bank Case applies with equal force to this situation. 'An action will lie whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged by natural justice and equity to refund. The form of the indebtedness or the mode in which it was incurred, is immaterial . . . .'" 295 U.S. at 261. See also *United States* v. *Emery, Bird, Thayer Realty Co.*, 237 U.S. 28, 32; *United States* v. *Jefferson Elec. Co.*, 291 U.S. 386, 402-03; *George Moore Ice Cream Co.* v. *Rose*, 289 U.S. 373, 379.

in *Blair* v. *Birkenstock*, 271 U.S. 348, that an overpayment of a tax payable in installments occurred at the time the total payments exceeded the correct tax, even though some installments remained unpaid.

4. In repeatedly urging that the decision below reflects settled law, the Government has lightly brushed aside long-standing decisions squarely upholding jurisdiction.

The Government has misstated the case authority dealing with suits to recover payments made in partial satisfaction of asserted tax liabilities. It states that *Bushmiaer* v. *United States*, 230 F.2d 146 (8th Cir.), is "the only decision in point which lends any support to the taxpayer's argument . . ." (Br. 21). Then it attempts by footnote to distinguish appellate decisions which, even before the *Bushmiaer* case, had generally been accepted as correctly establishing the right to bring such suits (Br. 22, n.7).

In 1940 the Court of Appeals for the Second Circuit rejected the Government's argument that a suit to recover two installment payments could not be instituted prior to payment of the remaining installments.[9] *Coates* v. *United States*, 111 F.2d 609 (2d Cir.). The Government would distinguish that case on the ground that collection of the balance of the tax was enforced while the suit was pending. That the court did not rely on any such distinction is shown by the language of the opinion quoted in taxpayer's original brief (Br. 7).

This decision was followed in 1941 by *Sirian Lamp Co.* v. *Manning*, 123 F.2d 776 (3d Cir.), where the court rejected

[9] Two earlier cases recognizing jurisdiction in a suit for refund despite the contemporaneous assertion of a deficiency, *Emery* v. *United States*, 27 F.2d 992 (W.D. Pa.); *Old Colony R.R.* v. *United States*, 27 F.2d 994 (D. Mass.), were cited with approval in *Old Colony Trust Co.* v. *Commissioner*, 279 U.S. 716, 728. See also *Thomas* v. *United States*, 18 F. Supp. 942 (Ct. Cl.), where the Government in 1937 apparently did not even raise the issue.

the argument that a suit to recover a payment in partial satisfaction of an asserted deficiency could not be instituted prior to payment of the entire deficiency. The Government seeks to distinguish that case because it involved a suit against the Collector instead of the United States. There, however, the court refused to read jurisdictional restrictions into language *identical* with that involved in this case. Rev. Stat. § 3226 (1875) (now Int. Rev. Code of 1954, §§ 6532(a)(1), 7422(a)).

The treatises and other published comments on the *Coates* and *Sirian Lamp* cases show that, even before the *Bushmiaer* decision, they were accepted as reflecting settled law on the issue. For example, the 1948 edition of Mertens, *Federal Income Taxation*, Vol. 10 § 58.47 n.67, states:

> "It is, of course, axiomatic that a tax must have been paid, either directly . . . or indirectly in order to be the subject of a suit for recovery of the tax. It is now settled that the taxpayer need not make full payment of the entire tax shown on the return in order to maintain a suit for refund [citing the *Coates* and *Sirian Lamp Co.* cases]. . . ."

The same treatise approved the *Sirian Lamp Co.* case in the following terms (Id. § 58.34):

> "[T]he Circuit Court properly [overcame] . . . the reasoning of the lower court that failure to require full payment might interfere with collection of the revenue, by stating that a taxpayer's suit for the recovery of a portion of the tax would not necessarily prevent the Commissioner's collection of the remainder, while it is pending." [10]

[10] See other comment to the same effect in: 3 Rabkin and Johnson, *Federal Income, Gift and Estate Taxation* § 72.04(6); 3 Casey, *Federal Tax Practice* § 11.5 (1955); Brodsky, *Tax Refunds and How to Obtain*

Recent district court decisions have also allowed such suits. *Hanchett* v. *Shaughnessy*, 126 F. Supp. 769 (N.D. N.Y.), allowed such a suit, although the asserted income tax deficiency had not been paid in full. *Jones* v. *Fox*, 57-2 U.S.T.C. ¶ 9876 (D. Md.) and *Midhudson Systems, Inc.* v. *United States*, 56-2 U.S.T.C. ¶ 9687 (S.D.N.Y.), allowed suits to recover payments of excise taxes although the entire assessments had not been paid, relying on the precedents in the income tax field. See also *McFarland* v. *United States*, 57-2 U.S.T.C. ¶ 9733 (M.D. Tenn.); *cf. Friebele* v. *United States*, 20 F. Supp. 492 (D.N.J.). In contrast, the decision below has been followed in only one case. *Rogers* v. *United States*, 155 F. Supp. 409 (E.D.N.Y.).

The Government cites *Suhr* v. *United States*, 18 F. 2d 81, 83 (3d Cir.); *Bendheim* v. *Commissioner*, 214 F. 2d 26, 28 (2d Cir.) and *McConkey* v. *Commissioner*, 199 F. 2d 892, 895 (4th Cir.), cert. denied, 345 U.S. 942. These cases are in no way pertinent to the issues of the present case. In the *Sirian Lamp Co.* case, *supra*, the Court of Appeals for the Third Circuit reversed a lower court which had erroneously relied on its decision in the *Suhr* case. The *Bendheim* case, like the *McConkey* case, dealt only with the right of appeal to the Tax Court. The *Coates* decision was not "repudiated" by the later decision of the same court in the *Bendheim* case or even cited in the opinion. Furthermore, the Government's failure to petition for certiorari in the *Coates* and *Sirian Lamp Co.* cases, and, even more significantly, in the *Bushmiaer* case, shows its acknowledg-

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Them 13-14 (Prentice-Hall 1955); Brodsky, *Suits for Refund*, 11th Annual N.Y.U. Institute on Federal Taxation 751-52 (1952); Brown, *Refund Suits Against Collectors*, 28 Taxes 937 (1950); Annot., 138 A.L.R. 1423 (1941); 54 Harv. L. Rev. 1404 (1941). Thus the only possible support reflected in the Government's brief for its statement regarding "the Treasury's long-standing interpretation and practice" (Br. 8) is that long ago two courts of appeals held the interpretation was wrong.

ment that there was no conflict on the issue prior to the decision below.[11]

5. The Government misinterprets the significance of Section 7422(e) of the 1954 Code.

The Government complains of the possibility of a multiplicity of suits which it undertakes to support with the following statement (Br. 20):

> "Under taxpayer's view of the statutory scheme for litigating deficiency determinations, a taxpayer against whom the Commissioner has asserted a deficiency might elect to contest its validity in the District Court by way of a refund suit based upon payment of only a part of the deficiency, and simultaneously contest its validity in the Tax Court by timely filing a petition for redetermination with respect to the balance."

The Government's reasoning is not clear and the foregoing statement is completely without foundation. Section 7422(e) of the Internal Revenue Code of 1954,[12] mentioned by the Government, covers squarely this question of dual jurisdiction.

Prior to the 1954 Code a taxpayer who filed suit for refund in a district court or the Court of Claims and thereafter received a statutory notice of deficiency for the same taxable year could file a petition for review in the Tax Court and thus give jurisdiction to two courts concurrently. *Ohio Steel Foundry Co.* v. *United States*, 38 F.2d 144 (Ct. Cl.); *Camp* v. *United States*, 44 F.2d 126 (4th Cir.). Congress enacted Section 7422(e) for the express purpose of

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[11] It is noteworthy that Congress in making substantial amendments in 1954 to the provisions of 28 U.S.C. § 1346(*a*) and the Internal Revenue Code did not see fit to change the accepted rule of the *Coates* and *Sirian Lamp Co.* cases. It is also significant that the Treasury did not seek any change in this rule.

[12] Set forth in the Appendix, *infra*.

confining jurisdiction under such circumstances to a single court, allowing the taxpayer to choose between the two.[13]

Throughout its brief the Government argues that a decision in the present case requires adjudication in the district court of the Commissioner's claim for additional taxes and that this is contrary to Congressional policy. Certainly on the merits the district court below had before it the single issue of whether petitioner was entitled to the questioned deduction and had thus overpaid his taxes, or was not entitled to the deduction and thus owed the additional taxes set out in the counterclaim. The argument that the consideration of such a case conflicts with Congressional policy is inconsistent with the Congressional recognition in Section 7422(e) that a taxpayer does have a right to maintain a suit for refund in the district court where an asserted deficiency for the same taxable year remains unpaid. Section 7422(e) neither created nor denied the right. It merely provided that the taxpayer could not exercise the right and at the same time maintain a case in the Tax Court.

The Government has, therefore, missed completely the real significance of Section 7422(e) in the present case. It is attempting to attribute to Congress an intent to deny a result which Congress expressly recognized by enacting Section 7422(e). The enactment of the Section supports taxpayer's position that the plain words of the statute be given their plain meaning and that jurdisdiction in the present case be upheld.

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[13] S. Rep. No. 1622, 83d Cong., 2d Sess. 610-11 (1954).

CONCLUSION

For the reasons stated, the judgment of the United States Court of Appeals for the Tenth Circuit should be reversed and the cause should be remanded to that Court with instructions to consider the appeal from the United States District Court upon the merits.

Respectfully submitted,

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April, 1958.

APPENDIX

Internal Revenue Code of 1954:

Sec. 6511. *Limitations on credit or refund.*

(a) *Period of limitation on filing claim.*—Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was required to be filed (determined without regard to any extension of time) or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid. Claim for credit or refund of an overpayment of any tax imposed by this title which is required to be paid by means of a stamp shall be filed by the taxpayer within 3 years from the time the tax was paid.

(b) *Limitation on allowance of credits and refunds.*—

(1) *Filing of claim within prescribed period.*—No credit or refund shall be allowed or made after the expiration of the period of limitation prescribed in subsection (a) for the filing of a claim for credit or refund, unless a claim for credit or refund is filed by the taxpayer within such period.

(2) *Limit on amount of credit or refund.*—

(A) *Limit to amount paid within 3 years.*—If the claim was filed by the taxpayer during the 3-year period prescribed in subsection (a), the amount of the credit or refund shall not exceed the portion of the tax paid within the 3 years immediately preceding the filing of the claim. If the tax was required to be paid by means of a stamp, the amount of the credit or refund shall not exceed the portion of the tax paid within the 3 years immediately preceding the filing of the claim.

(B) *Limit to amount paid within 2 years.*—If the claim was not filed within such 3-year period, the amount of the credit or refund shall not exceed the

the taxpayer files a petition for redetermination of its correctness. Int. Rev. Code of 1954, § 6213. The Government's argument is based on the erroneous assumption that maintenance of a suit for refund of an amount paid in partial satisfaction of an assessed deficiency has the same effect as a petition to the Tax Court in restraining the assessment and collection of taxes.

The same erroneous assumption underlies the Government's arguments that the maintenance of this suit circumvents both the prohibition against suits to enjoin collection of taxes and the provision expressly excepting tax cases from the operation of the Federal Declaratory Judgments Act (Br. 17-19). This erroneous assumption is also present in the language quoted from the dissenting opinion in *Bushmiaer* v. *United States*, 230 F.2d 146 (8th Cir.) (Br. 21-22).

It should be perfectly clear that a suit to recover a payment made on an assessment does not relieve the taxpayer from his obligation to pay the balance of the assessment nor restrain the Director from proceeding to collect the balance. Nowhere in the record is there any indication taxpayer asked the District Court for such restraint. Section 7421 of the Internal Revenue Code of 1954 would clearly prohibit it.

The Government could not argue forthrightly that the bringing of this suit in any way restrained collection. It perhaps tacitly admits the contrary with the curious comment that "the Government was under no duty after commencement of the suit to remove the jurisdictional defect . . . by collecting the balance of the assessment (Br. 6; see also Br. 23). This begs the question by assuming that there is a jurisdictional defect. Moreover, the Director of Internal Revenue does have a duty to demand and collect. Int. Rev. Code of 1954, §§ 6301, 6303(a). Although the Government continues throughout its brief to insinuate that the

bringing of this suit somehow enabled the taxpayer arbitrarily to ignore the claim of the Director for the balance of the tax, absolutely no authority is cited to explain how this suit in any way affected the broad powers of collection set out in Chapter 64 of the Internal Revenue Code of 1954 or the criminal penalties for punishment of anyone who attempts to thwart collection.[7]

The Government's extensive reliance upon bald statements that the payment for which suit was brought was a "token" payment and that taxpayer "chose" to withhold the balance while suing to recover the payment evades acknowledgment of the real reason why the entire assessment was not collected (Br. 5, 6, 7, 8, 12, 13, 14, 19, 23). Where a taxpayer has paid all that he can, it is impertinent for the Government to refer to it as a "token." In the present case an assessment was made against taxpayer in the amount of $28,908.60, and payments were thereafter made totaling $5,058.54 (R. 11). Failure to collect the entire assessment during the twenty-eight month period between assessment and suit (R. 1, 5) can be attributed only to taxpayer's inability to pay.

Thus, the failure of the Commissioner to collect more from taxpayer could be due only to the old principle that it is impossible to get blood out of a turnip. Any gross disproportion between the amount that the taxpayer is able to pay and the total amount of an assessment merely emphasizes the futility of telling him that he has a right to sue, but must wait until he has completed his payments.

3. The Government has drawn unwarranted inferences from general statements by this Court which do not allude even remotely to the issue here.

The Government argues that a requirement of payment of "the entire deficiency" prior to a suit for refund of

[7] Int. Rev. Code of 1954, §§ 7201, 7206, 7212.

portion of the tax paid during the 2 years immediately preceding the filing of the claim.

(C) *Limit if no claim filed.*—If no claim was filed, the credit or refund shall not exceed the amount which would be allowable under subparagraph (A) or (B), as the case may be, if claim was filed on the date the credit or refund is allowed.

* * * * * * *

Sec. 6532. *Periods of limitation on suits.*

(a) *Suits by taxpayers for refund.*—

(1) *General rule.*—No suit or proceeding under section 7422(a) for the recovery of any internal revenue tax, penalty, or other sum, shall be begun before the expiration of 6 months from the date of filing the claim required under such section unless the Secretary or his delegate renders a decision thereon within that time, nor after the expiration of 2 years from the date of mailing by registered mail by the Secretary or his delegate to the taxpayer of a notice of the disallowance of the part of the claim to which the suit or proceeding relates.

* * * * * * *

Sec. 7422. *Civil actions for refund.*

(a) *No suit prior to filing claim for refund.*—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof.

* * * * * * *

(e) *Stay of proceedings.*—If the Secretary or his delegate prior to the hearing of a suit brought by a taxpayer

in a district court or the Court of Claims for the recovery of any income tax, estate tax, or gift tax (or any penalty relating to such taxes) mails to the taxpayer a notice that a deficiency has been determined in respect of the tax which is the subject matter of taxpayer's suit, the proceedings in taxpayer's suit shall be stayed during the period of time in which the taxpayer may file a petition with the Tax Court for a redetermination of the asserted deficiency, and for 60 days thereafter. If the taxpayer files a petition with the Tax Court, the district court or the Court of Claims, as the case may be, shall lose jurisdiction of taxpayer's suit to whatever extent jurisdiction is acquired by the Tax Court of the subject matter of taxpayer's suit for refund. If the taxpayer does not file a petition with the Tax Court for a redetermination of the asserted deficiency, the United States may counterclaim in the taxpayer's suit, or intervene in the event of a suit as described in subsection (c) (relating to suits against officers or employees of the United States), within the period of the stay of proceedings notwithstanding that the time for such pleading may have otherwise expired. The taxpayer shall have the burden of proof with respect to the issues raised by such counterclaim or intervention of the United States except as to the issue of whether the taxpayer has been guilty of fraud with intent to evade tax. This subsection shall not apply to a suit by a taxpayer which, prior to the date of enactment of this title, is commenced, instituted, or pending in a district court or the Court of Claims for the recovery of any income tax, estate tax, or gift tax (or any penalty relating to such taxes).

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No. 492

In the Supreme Court of the United States

OCTOBER TERM, 1957

WALTER W. FLORA, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 14–18) is not yet officially reported. The opinion of the District Court (R. 12–18) is reported at 142 F. Supp. 602.

JURISDICTION

The judgment of the Court of Appeals was entered on July 1, 1957. The petition for a writ of certiorari was filed on September 23, 1957. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTION PRESENTED

Whether the United States District Court has jurisdiction of a tax refund suit when the taxpayer

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Appeals (R. 14–18) is reported at 246 F. 2d 929. The memorandum of the District Court (R. 6–9) is reported at 142 F. Supp. 602.

JURISDICTION

The judgment of the Court of Appeals was entered on July 1, 1957. (R. 18.) The petition for a writ of certiorari was filed on September 23, 1957, and was granted on November 25, 1957. (R. 19.) The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

has not paid his entire income tax for the taxable year involved.

STATUTES INVOLVED

28 U. S. C.:

SEC. 1346. *United States as defendant.*

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

(1) [as amended by Sec. 1, Act of July 30, 1954, c. 648, 68 Stat. 589] Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws; * * *

* * * * * *

Internal Revenue Code of 1954:

SEC. 7422. CIVIL ACTIONS FOR REFUND.

(a) *No Suit Prior to Filing Claim for Refund.*—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, * * *.

* * * * * *

(26 U. S. C., 1952 ed., Supp. II, Sec. 7422 (a).)

STATEMENT

The relevant facts are not in dispute. During the year 1950, the taxpayer engaged in transactions involving the purchase and sale of commodity futures and commodities, suffering a net loss of $85,216.10. (R. 40, 41.) This was reported as an ordinary loss. This was disallowed by the Internal Revenue Service, resulting in an addition to the income of taxpayer of $42,608.05, and an assessment of additional tax, plus interest, of $28,908.60. A later assessment was made of a penalty of $45, plus interest. Taxpayer paid a total of $5,058.54 on these assessments, and filed a claim for refund. Upon its disallowance, this suit followed. (R. 20–21.) The United States counterclaimed for the balance of the deficiency. (R. 9–10.)

The United States filed a motion to dismiss on the ground that jurisdiction was lacking since taxpayer had not paid the entire amount of income taxes for 1950. (R. 7.) On February 27, 1956, the District Court ordered that the motion to dismiss be overruled. (R. 11.) In its opinion of July 24, 1956, the District Court reviewed this question (R. 13–15) and stated that the taxpayer "should not maintain the instant suit" (R. 15). However, in view of a conflict between the Third and Eighth Circuits, and since the Court of Appeals for the Tenth Circuit had not passed on the question, the court considered the merits of the case. On the merits, it decided that the losses sustained were capital losses and entered judgment against taxpayer and in favor of

the United States on its counterclaim. (R. 21–22.)

On appeal, the Court of Appeals did not reach the merits, but decided that since taxpayer's complaint affirmatively showed that only a partial payment on the deficiency assessment had been made, the District Court was without jurisdiction. It remanded the case to the District Court with directions to vacate the judgment for the United States on its counterclaim and to dismiss the action without prejudice. (Pet. 18.)

DISCUSSION

As taxpayer points out (Pet. 5), the decision below is in direct conflict with the decision of the Court of Appeals for the Eighth Circuit in *Bushmiaer* v. *United States*, 230 F. 2d 146. It may also possibly be considered to be in conflict with *Coates* v. *United States*, 111 F. 2d 609 (C. A. 2d), and *Sirian Lamp Co.* v. *Manning*, 123 F. 2d 776 (C. A. 3d), although we believe the latter two distinguishable, particularly in view of *Suhr* v. *United States*, 18 F. 2d 81, 83 (C. A. 3d), and the comments in *Bendheim* v. *Commissioner*, 214 F. 2d 26 (C. A. 2d).

While we believe that the decision below is correct and in accord with the views previously expressed by this Court, we do not oppose the granting of the writ of certiorari in view of the direct conflict between the Eighth and Tenth Circuits.

The question, one solely of law, is one of continuing importance in the administration of the internal revenue laws, under the Internal Revenue Code of 1954 as well as its predecessors, and may be

expected to recur until authoritatively settled by this Court.

CONCLUSION

For the reasons stated, the Government does not oppose the granting of certiorari.

Respectfully submitted,

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OCTOBER 1957.

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No. 492

In the Supreme Court of the United States

OCTOBER TERM, 1957

WALTER W. FLORA, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
CHARLES K. RICE,
Assistant Attorney General,
JOHN N. STULL,
HARRY BAUM,
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judgment, which the United States pledges herself to pay.

* * * * *

* * * While a free course of remonstrance and appeal is allowed within the departments before the money is finally exacted, the general government has wisely made the payment of the tax claimed, whether of customs or of internal revenue, a condition precedent to a resort to the courts by the party against whom the tax is assessed. * * * If the compliance with this condition requires the party aggrieved to pay the money, he must do it. He cannot, after the decision is rendered against him, protract the time within which he can contest that decision in the courts by his own delay in paying the money. It is essential to the honor and orderly conduct of the government that its taxes should be promptly paid, and drawbacks speedily adjusted; and the rule prescribed in this class of cases is neither arbitrary nor unreasonable. * * *

The objecting party can take his appeal. He can, if the decision is delayed beyond twelve months, rest his case on that decision; or he can pay the amount claimed, and commence his suit at any time within that period. * * *

It may be noted that the Court refers to paying "the tax" or paying "the tax claimed," or paying "the amount claimed," as a prerequisite to suit. More important, if it were thought that by a token payment only the taxpayer could litigate the validity of the entire assessment, the Court's justification of the hardship to the taxpayer would have been unnecessary.

This Court has frequently cited the *Cheatham* case, both before the 1921 provisions (*Savings Institution* v. *Blair*, 116 U. S. 200, 205–206; *Dodge* v. *Osborn*, 240 U. S. 118) and since (*Graham* v. *du Pont*, 262 U. S. 234, 254–255; *Phillips* v. *Commissioner*, 283 U. S. 589, 595; *United States* v. *Jefferson Electric Co.*, 291 U. S. 386, 395–396; *Dobson* v. *Commissioner*, 320 U. S. 489, 496). In these cases, and in others not specifically referring to the *Cheatham* case, the Court has consistently adverted to the requirement of payment of the tax as a condition precedent to suit in terms which in their context can only show that payment of the entire tax was called for. In *Bailey* v. *George*, 259 U. S. 16, 20, for example, in which the Court denied an injunction against collection of the child labor tax (which it held unconstitutional in the *Child Labor Tax Case*, 259 U. S. 20, decided the same day), the Court pointed out that "They might have paid the amount assessed under protest and then brought suit against the Collector to recover the amount paid with interest." In other cases, decided after the enactment of the 1921 Act, the Court has consistently referred to the principle of "pay first and litigate later" (Mr. Justice Reed, concurring, in *Allen* v. *Regents*, 304 U. S. 439, 456) in terms which show that the entire tax, and not merely a token amount, must be paid. In *Bull* v. *United States*, 295 U. S. 247, 260, the Court remarked that "Payment precedes defense * * *." Again in *Phillips* v. *Commissioner*, 283 U. S. 589, 596, 598, 599, involving a question of transferee liability, the Court referred to "the need

of the government promptly to secure its revenues" and to "the right of the United States to exact immediate payment and to relegate the taxpayer to a suit for recovery" as "paramount." It pointed out that the transferee has his remedy of suit where he has paid "the tax." In *Blair* v. *Birkenstock*, 271 U. S. 348, the Court held that an installment payment of a part of a tax is not the tax. In all these cases, it is plain from the context that, when the Court refers to the statutes as requiring payment of the tax prior to suit, it is construing them as requiring payment of the entire tax.

3. THE ESTABLISHMENT OF THE BOARD OF TAX APPEALS

Similarly, the recommendations of the congressional committees and the action of Congress itself in creating the Board of Tax Appeals in 1924 are explainable only on the assumption that the taxpayer was obliged under the statutes authorizing refund suits to pay the entire tax before bringing suit for refund. If taxpayers could have obtained a judicial determination of their tax liability in advance of the payment of the whole by making a token payment and suing for refund, there would have been no hardship to alleviate and no need for the Board of Tax Appeals (now the Tax Court). The House Committee on Ways and Means explained the reason for the creation of the Board of Tax Appeals in part as follows (H. Rep. No. 179, 68th Cong., 1st Sess., pp. 7–8 (1939–1 Cum. Bull. (Part 2) 241, 246–247):

> The committee recommends the establishment of a Board of Tax Appeals to which a taxpayer

> may appeal prior to the payment of an additional assessment of income, excess-profits, war-profits, or estate taxes. Although a taxpayer may, after payment of his tax, bring suit for the recovery thereof and thus secure a judicial determination of the questions involved, he can not, in view of section 3224 of the Revised Statutes, which prohibits suits to enjoin the collection of taxes, secure such a determination prior to the payment of the tax. The right of appeal after payment of the tax is an incomplete remedy, and does little to remove the hardship occasioned by an incorrect assessment. The payment of a large additional tax on income received several years previous and which may have, since its receipt, been either wiped out by subsequent losses, invested in nonliquid assets, or spent, sometimes forces taxpayers into bankruptcy, and often causes great financial hardship and sacrifice. These results are not remedied by permitting the taxpayer to sue for the recovery of the tax after this payment. He is entitled to an appeal and to a determination of his liability for the tax prior to its payment.

The Senate Committee on Finance offered a similar explanation. S. Rep. No. 398, 68th Cong., 1st Sess., pp. 8–9 (1939–1 Cum. Bull. (Part 2) 266, 271).[2]

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[2] Again, in the reports on the Revenue Bill of 1926, the understanding of Congress that the entire tax must be paid is reflected. The House Report (H. Rep. No. 1, 69th Cong., 1st Sess. (1925), p. 10 (1939–1 Cum. Bull. (Part 2) 315, 321), in recommending a right of appeal from Board of Tax Appeals decisions, states—

> Under the existing law, after the commissioner determines a deficiency, the taxpayer has 60 days within which

As this Court stated in *Old Colony Tr. Co. v. Commissioner*, 279 U. S. 716, 721:

> The Board of Tax Appeals * * * was created by Congress to provide taxpayers an opportunity to secure an independent review of the Commissioner of Internal Revenue's determination of additional income and estate taxes by the Board *in advance of their paying the tax found by the Commissioner to be due.* Before the Act of 1924 the taxpayer could only contest the Commissioner's determination of *the amount of tax after its payment.* [Italics supplied.]

To permit the District Court to entertain the taxpayer's suit in the instant case and decide the merits of the controversy would for all practical purposes blur, if not completely erase, this jurisdictional line drawn by Congress between pre-payment petitions for redetermination of an asserted deficiency (over which the Tax Court alone has jurisdiction) and post-payment suits for refund (over which the District Courts and the Court of Claims have concurrent jurisdiction). The respective jurisdictional areas delineated by Congress, instead of providing taxpayers a choice

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to appeal his case to the Board of Tax Appeals. If the Board of Tax Appeals renders an adverse decision, the taxpayer can then pay his tax and file a claim for refund, which, when rejected by the commissioner, still gives him the right to file a suit in the courts to recover the tax so paid. Under the procedure recommended in this bill the taxpayer, upon receipt of a letter from the commissioner setting forth a deficiency, has only one opportunity to take his case to the courts. * * *

See also S. Rep. No. 52, 69th Cong., 1st Sess. (1926), p. 25 (1939-1 Cum. Bull. (Part 2) 332, 351).

of either of the two methods of litigating the deficiency, would overlap and afford taxpayers a third and hybrid choice never contemplated by Congress—a right to sue for refund after a partial pre-payment of the deficiency.

4. THE CONGRESSIONAL POLICY EXPRESSED IN FUNCTIONALLY RELATED STATUTES

The construction by the court below of the statute here involved is also supported by consideration of related provisions. These provisions emphasize the congressional purpose to preclude the adjudication of tax liability in the District Courts unless the full amount of the contested deficiency has been paid. It has long been established, for example, that the collection of a tax may not be enjoined, except in unusual circumstances. The provision of Section 7421 of the 1954 Code that no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court merely reenacts this long-established rule, derived through Revised Statutes, Section 3224, from Section 10, Act of March 2, 1867 (c. 169, 14 Stat. 471). See *Snyder* v. *Marks*, 109 U. S. 189, and *Graham* v. *du Pont*, 262 U. S. 234; cf. *Shelton* v. *Platt*, 139 U. S. 591, 594–595.

Even more significant is the fact that the Federal Declaratory Judgments Act (Section 274D, Judicial Code, as added by the Act of June 14, 1934, c. 512, 48 Stat. 955) was amended by Section 405 of the Revenue Act of 1935 (c. 829, 49 Stat. 1014) expressly

QUESTION PRESENTED

Whether the United States District Court has jurisdiction of a tax refund suit, challenging the correctness of an income tax deficiency asserted by the Commissioner of Internal Revenue, where the taxpayer has paid only a part of the deficiency.

STATUTES INVOLVED

28 U. S. C.:

SECTION 1346. *United States as defendant*

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

(1) [as amended by Sec. 1, Act of July 30, 1954, c. 648, 68 Stat. 589]. Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws; *

* * * * *

Internal Revenue Code of 1954:

SEC. 7422. CIVIL ACTIONS FOR REFUND.

(a) *No Suit Prior to Filing Claim for Refund.*—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or

his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof.

* * * * *

(26 U. S. C. 1952 ed., Supp. IV, Sec. 7422 (a):)

STATEMENT

The relevant facts are not in dispute. During the year 1950, the taxpayer engaged in transactions involving the purchase and sale of commodity futures and commodities, suffering a net loss of $85,216.10. This was reported as an ordinary loss, but was allowed only as a capital loss by the Commissioner of Internal Revenue, resulting in an addition to the income of taxpayer of $42,608.05, and an assessment of additional tax, plus interest, of $28,908.60. A later assessment was made of a penalty of $45, plus interest. Taxpayer paid a total of $5,058.54 on these assessments, and filed a claim for refund. (R. 11.) Upon its disallowance, this suit followed. (R. 1–3.) The United States counterclaimed for the balance of the deficiency. (R. 5.)

The United States filed a motion to dismiss on the ground that jurisdiction was lacking, since taxpayer had not paid the entire amount of the deficiency assessment. The District Court overruled the motion to dismiss. (R. 5–6.) In its opinion, the District Court reviewed the question of jurisdiction (R. 6–9), concluding that the taxpayer "should not maintain the instant suit" (R. 9); however, since the Court of Appeals for the Tenth Circuit had not passed on the question, the court considered the merits of the case.

On the merits, it decided that the losses sustained were capital losses and entered judgment denying taxpayer's refund claim and in favor of the the United States on its counterclaim. (R. 12–13.)

On appeal, the Court of Appeals did not reach the merits, but decided that, since taxpayer's complaint affirmatively showed that only a partial payment on the deficiency assessment had been made, the District Court was without jurisdiction. It remanded the case to the District Court with directions to vacate the judgment for the United States on its counterclaim and to dismiss the action without prejudice. (R. 18–19.)

SUMMARY OF ARGUMENT

The courts below correctly held that, since taxpayer had failed to pay the full amount of the challenged income tax deficiency, he could not contest its validity by way of a refund suit in the District Court. The history of the statutory provision vesting in the District Courts jurisdiction of tax refund suits, the statutory scheme for determining and collecting an income tax deficiency asserted by the Commissioner of Internal Revenue, the reasons underlying the creation of the Tax Court as an independent tribunal for adjudicating the correctness of a deficiency in advance of its payment, and decisions of this Court regarding the different roles played by the Tax Court and District Courts in the administration of the taxing statute, all make it clear that full payment of a contested deficiency is a condition precedent to a suit for refund in the District Court. Related statutory provisions, such as the prohibition of injunctions against collec-

tion of taxes and the exception of tax controversies from the operation of the Federal Declaratory Judgments Act, confirm this.

Under the system devised by Congress for adjudicating tax controversies, long followed by the Treasury and accepted by taxpayers, a taxpayer who challenges the propriety of the Commissioner's deficiency determination has a choice of either filing a petition for redetermination in the Tax Court prior to payment, or of first paying the deficiency and then suing for refund in the District Court (or Court of Claims). He may not, as taxpayer here seeks to do, elect to pursue a hybrid method by making a token payment of part of the deficiency (presumably even a dollar would suffice), withhold the balance, and litigate the correctness of the entire deficiency in the guise of a refund suit. To permit a taxpayer to invoke the jurisdiction of the District Court simply by paying a part of the deficiency would not only invite a multiplicity of suits with respect to the same tax deficiency, but for all practical purposes would obliterate the jurisdictional line drawn by Congress between the Tax Court and the District Court. If there is to be any change in the established system, it should be accomplished by Congress which designed the system, not by judicial decision.

That the Government might have resorted to its seizure powers in order to collect the portion of the deficiency which taxpayer failed voluntarily to pay does not, as taxpayer assumes, confer upon the District Court authority to entertain the refund suit and de-

termine the validity of the entire deficiency. The Government was under no duty after commencement of the suit to remove the jurisdictional defect by seizing taxpayer's property in satisfaction of the unpaid balance. Nor is the taxpayer subjected to undue hardship, as he claims, by conditioning his right to bring a refund suit in the District Court upon prepayment of the full deficiency, for he was at liberty by filing a timely petition in the Tax Court to contest the entire deficiency in that forum without paying any part of it in advance—not even the token amount he chose to pay.

ARGUMENT

THE TAXPAYER HAVING FAILED TO PAY THE FULL AMOUNT OF THE CONTESTED DEFICIENCY, THE COURTS BELOW CORRECTLY HELD THAT THE DISTRICT COURT WAS WITHOUT JURISDICTION OF THE TAXPAYER'S SUIT FOR REFUND

1. INTRODUCTION

Taxpayer was notified of a deficiency in income tax for the taxable year 1950 of $27,251.13, plus interest, on the ground that an amount deducted in his return as an ordinary loss was deductible only as a capital loss. If he wished to contest this liability prior to payment of the additional tax, he could have petitioned the Tax Court for a redetermination of the deficiency, with the usual right of appeal if dissatisfied with the Tax Court's decision (Internal Revenue Code of 1954, Sections 6211–6215, 6512, 7482). As an alternative procedure, taxpayer could have paid the additional tax, filed a claim for refund, and upon its disallowance have brought an action in the District Court or Court of Claims (Internal

Revenue Code of 1954, Section 7422; 28 U. S. C., Sections 1346 (a) (1), 1491, and 1291). Each of these two procedures has advantages and disadvantages.

Taxpayer, however, chose neither; but instead made a partial or token payment of $5,058.54, and then filed his refund claim, followed by the present suit. The issue here is whether the suit is authorized under the applicable statutes.

It is elementary that the Government may be sued only with its consent. The consent here involved is found in 28 U. S. C., Section 1346 (a) (*supra*, p. 2), which confers upon the District Courts jurisdiction of suits—

> * * * for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected * * * or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws; * * *

Corollary Section 7422 (a) of the Internal Revenue Code of 1954 (*supra*, pp. 2–3) provides that such suits, described in similar language, may not be maintained in any court until a claim for refund or credit has been duly filed with the Secretary of the Treasury or his delegate.

Obviously, before there can be a refund or a recovery, there must have been a payment to be refunded or recovered. The statutes merely assume that a payment has been made, voluntarily or involuntarily. Where, as here, the taxpayer files an income tax return and pays the tax shown on the return, and the Commissioner of Internal Revenue asserts a

deficiency which the taxpayer challenges *in toto*, the precise question is whether the terms "any internal revenue tax" and "any sum," as used in the statutes, refer to the entire deficiency, or only to that part of it which the taxpayer chooses to pay.

Taxpayer, relying heavily on the literal meaning of these terms, takes the position that he is entitled to litigate the validity of the Commissioner's deficiency determination by way of a refund suit in the District Court without having first paid the entire deficiency, and, indeed, on the basis of a payment of whatever part of the challenged deficiency he cares to make; presumably even a dollar would suffice. We submit, as both courts below held, that taxpayers' position cannot be reconciled with the legislative background of the applicable statute, functionally related statutory provisions, the Treasury's long-standing interpretation and practice, and relevant decisions of this Court.

Taxpayer's position, in short, ignores the settled and salutary rule that the literal meaning of statutory words yields to legislative policy and purpose. *United States* v. *Amer. Trucking Ass'ns.*, 310 U. S. 534, 542–544; *Harrison* v. *Northern Trust Co.*, 317 U. S. 476; *Ozawa* v. *United States*, 260 U. S. 178, 194. To subscribe to taxpayer's interpretation would, for all practical purposes, destroy the firmly established statutory scheme for judicial correction of erroneous deficiency determinations of the Commissioner of Internal Revenue. It would in effect transfer to the District Courts jurisdiction over a class of tax controversies which Congress has specifically assigned to

the Tax Court (formerly the Board of Tax Appeals)—namely, authority to adjudicate the correctness of an asserted income tax deficiency prior to the taxpayer's payment of the additional tax.

2. THIS COURT'S DECISIONS AND THE EVOLUTION OF THE PRESENT STATUTES

The jurisdiction of the District Courts in tax refund suits originally rested on the Tucker Act (Act of March 3, 1887, c. 359, 24 Stat. 505, Sections 1 and 2), conferring jurisdiction, concurrent with the Court of Claims, of—

> All claims founded upon the Constitution of the United States or any law of Congress, * * *, or upon any contract, expressed or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable: * * *

The jurisdiction of the District Courts was limited to cases where the amount of the claim did not exceed $1,000. In 1911, upon enactment of the Judicial Code, Section 24, Twentieth, the jurisdictional amount was raised to $10,000.

The language of the section of the Judicial Code here involved is derived from Section 1310 (*c*) of the Revenue Act of 1921 (c. 136, 42 Stat. 227), which added to Paragraph Twentieth of Section 24 of the Judicial Code the following:

> Concurrent with the Court of Claims, of any suit or proceeding, commenced after the passage of the Revenue Act of 1921, for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected, under the internal-revenue laws, even if the claim exceeds $10,000, if the collector of internal-revenue by whom such tax, penalty, or sum was collected is dead at the time such suit or proceeding is commenced.

The 1921 amendment was intended merely to confer jurisdiction where the claim exceeded $10,000, if the Collector by whom the tax was collected is dead at the time the suit was commenced, but not to make any other change in the settled principles applicable to refund suits (H. Conference Rep. No. 486, 67th Cong., 1st Sess. (1921), p. 57 (1939-1 Cum. Bull. (Part 2) 206, 238)).[1]

One of these principles was that a tax must be paid prior to litigation. Implicit in the decisions applying this principle had been the understanding that the entire tax must have been paid. An early leading case, *Cheatham* v. *United States*, 92 U. S. 85, 88–89, involving the Civil War income tax law, was a refund

[1] The section was reenacted without change in Section 1025 (c), Revenue Act of 1924, c. 234, 43 Stat. 253, and in Section 1122 (c), Revenue Act of 1926, c. 27, 44 Stat. 9. In 1954 the statute was amended to remove the $10,000 jurisdictional limit and to authorize a jury trial (Sec. 2, Act of July 30, 1954, c. 648, 68 Stat. 589).

suit. Section 19 of the Act of July 13, 1866 (c. 184, 14 Stat. 98), provided that no suit should be maintained in any court "for the recovery of any tax alleged to have been erroneously or illegally assessed or collected" until after appeal to the Commissioner and unless filed within a certain time thereafter. The case turned on the questions whether such appeal had been made and whether the time limit had been complied with. Mr. Justice Miller, during the course of his opinion, set out the justification for the requirement of appeal to the Commissioner (pp. 88–89):

> All governments, in all times, have found it necessary to adopt stringent measures for the collection of taxes, and to be rigid in the enforcement of them.
>
> * * * Such appeals are allowed to specified tribunals as the law-makers deem expedient. Such remedies, also, for recovering back taxes illegally exacted, as may seem wise, are provided. In these respects, the United States have, as was said by this court in *Nichols* v. *United States*, 7 Wall. 122, enacted a system of corrective justice, as well as a system of taxation, in both its customs and internal-revenue branches. That system is intended to be complete. * * *
>
> So also, in the internal-revenue department, the statute which we have copied allows appeals from the assessor to the commissioner of internal revenue; and, if dissatisfied with his decision, on paying the tax the party can sue the collector; and, if the money was wrongfully exacted, the courts will give him relief by a

to except from its operation controversies "with respect to Federal taxes." (28 U. S. C., Section 2201.)[3] This action was taken in recognition of the fact that applicability of the act to income taxes would be "a complete reversal of our present scheme of taxation" and of the essential principle that taxpayers be required to "pay first and litigate later."[4] The only forum in which a taxpayer is authorized to seek a judicial determination of the correctness of an asserted tax deficiency, without first having paid it, is the Tax Court, the tribunal specially created by Congress for that purpose. If, as taxpayer contends, the District Court has jurisdiction to adjudicate the validity of the entire amount of a contested deficiency on the basis of but a partial payment of the amount in controversy, the explicit exclusion of tax contro-

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[3] In this connection, the Senate Finance Committee stated (S. Rep. No. 1240, 74th Cong., 1st Sess., p. 11 (1939–1 Cum. Bull. (Part 2) 651, 657)):

> Your committee has added an amendment making it clear that the Federal Declaratory Judgments Act of June 14, 1934, has no application to Federal taxes. The application of the Declaratory Judgments Act to taxes would constitute a radical departure from the long-continued policy of Congress (as expressed in Rev. Stat. 3224 and other provisions) with respect to the determination, assessment, and collection of Federal taxes. Your committee believes that the orderly and prompt determination and collection of Federal taxes should not be interfered with by a procedure designed to facilitate the settlement of private controversies, and that existing procedure both in the Board of Tax Appeals and the courts affords ample remedies for the correction of tax errors.

[4] See Wideman, *Application of the Declaratory Judgment Act to Tax Suits*, 13 The Tax Magazine 539, 540 (1935); Borchard, *Declaratory Judgments* (2d ed.), pp. 850, 854.

versies from the operation of the Declaratory Judgments Act may be circumvented simply by the payment of any part, however small, of the contested deficiency, followed by the institution of a "refund suit" seeking the District Court's determination that the deficiency was improperly asserted.

5. THE SCOPE OF THE "CAUSE OF ACTION" INVOLVED IN A REFUND SUIT

Furthermore, to permit a taxpayer to contest an asserted income tax deficiency by means of a refund suit based on such a partial prepayment would run counter to the basic statutory scheme for computing and collecting the income tax due. The income "tax" is a single tax imposed upon the net "taxable income" for a particular taxable year (Internal Revenue Code of 1954, Sections 1, 63)—arrived at after taking into account numerous items of gross income, deductions, credits, etc.—and a "deficiency" asserted by the Commissioner represents the difference between "the tax" imposed and the amount theretofore reported and paid (Sections 6211–6212). Even where the determination of the correct tax liability may involve several items or issues, the amount of a claimed "deficiency" is a single "sum," not an amount divisible and subdivisible into a series of component sums. This is *a fortiori* true where, as here, the validity of the entire deficiency depends upon the outcome of a single issue—namely, whether a loss sustained by the taxpayer is deductible as an ordinary loss, as he reported it, or only as a capital loss, as the Commissioner ruled in his deficiency notice. In short, when

the statutory provision conferring upon District Courts jurisdiction of refund suits is read in the light of its history, and in conjunction with related statutory provisions, it becomes clear that the phrases "any internal revenue tax" and "any sum" as used in that provision have reference, in the case of a claimed deficiency, to the entire deficiency, not just to some part of it.

A contrary construction, it should be added, would seemingly invite "splitting" of this cause of action through the filing of a multiplicity of suits with respect to the same deficiency. Under taxpayer's view of the statutory scheme for litigating deficiency determinations, a taxpayer against whom the Commissioner has asserted a deficiency might elect to contest its validity in the District Court by way of a refund suit based upon payment of only a part of the deficiency, and simultaneously contest its validity in the Tax Court by timely filing a petition for redetermination with respect to the balance. Although the first judgment entered in the two proceedings would presumably be binding in the other on collateral estoppel grounds, the statutory provision vesting in the District Courts jurisdiction over tax refund suits certainly was never designed to authorize, much less invite, a multiplicity of suits with respect to the same deficiency, either in the same forum or in different forums.[5]

[5] Congressional policy in this regard is evidenced by Section 7422 (e) of the 1954 Code (which had no counterpart in the 1939 Code), addressed to the unusual situation in which both the Tax Court and a District Court might have acquired

6. THE DECISIONS OF THE COURTS OF APPEALS

The only decision in point which lends any support to the taxpayer's argument, and upon which he chiefly relies, is *Bushmiaer* v. *United States*, 230 F. 2d 146 (C. A. 8th).[6] We submit that the reasoning of the majority opinion in that case is unpersuasive, and that the court below properly declined to follow it. The correct view, we submit, is that expressed in the dissenting opinion in the *Bushmiaer* case, *supra*, with which the court below agreed. As Judge Woodrough stated in his dissent (pp. 154–155):

> No provisions of the law justify maintenance of an action to adjudicate invalidity of a tax in order to recover a token payment that has been made thereon.
>
> Congress did not intend to prevent courts from adjudicating against the United States at some stage upon the validity of any tax laid against a taxpayer. But Congress can and has pro-

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concurrent jurisdiction with respect to a taxpayer's tax liability for the same taxable year—namely, where the Commissioner asserts a deficiency *after* the taxpayer has paid the *entire* tax reported in his return and has already instituted a refund suit. Under Section 7422 (e), the taxpayer's *entire* tax liability in such a case must be litigated in one court or the other, either in the pending District Court suit or else by transfer to the Tax Court. See S. Rep. No. 1622, 83d Cong., 2d Sess., pp. 610–611 (3 U. S. C. Cong. & Adm. News (1954) 4621, 5261).

[6] Because of the conflict between that decision and the decision below, and the importance of the question in the administration of the internal revenue laws, the Government did not oppose the granting of the writ of certiorari in the instant case.

> hibited judicial interference with the collecting of the tax in the first instance. * * *
>
> * * * * *
>
> * * * In the case before us plaintiffs are attempting to obtain adjudication upon the validity of taxes that have not been collected. They have delivered partial payments insignificant compared to the tax and request adjudication that the whole tax is illegal. I think all that is presented is an ingenious device to induce the court to disobey the long settled and fundamental prohibition that has been lawfully (and wisely) directed against courts interfering with the collecting of taxes in the first instance.

See also *Suhr* v. *United States*, 18 F. 2d 81, 83 (C. A. 3d); *Bendheim* v. *Commissioner*, 214 F. 2d 26, 28 (C. A. 2d); *McConkey* v. *Commissioner*, 199 F. 2d 892, 895 (C. A. 4th). Compare *Coates* v. *United States*, 111 F. 2d 609 (C. A. 2d), and *Sirian Lamp Co.* v. *Manning*, 123 F. 2d 776 (C. A. 3d).[7]

Taxpayer, like the majority in *Bushmiaer* (230 F. 2d at 151–152), suggests that the Government is free to attempt to collect the unpaid portion of the defi-

[7] In *Coates*, the taxpayer had not made full payment before bringing his refund action, but did make such payment thereafter. In *Sirian Lamp*, jurisdiction over a suit against the collector for refund of a partial payment was sustained on the theory that suits against the collector arise out of the common law and not under the statute. We believe that both of these two cases were decided erroneously, but in any event neither is applicable here. In the instant case, the taxpayer has never made payment of the balance due (*Coates*); nor is his suit one against the collector (*Sirian Lamp*). The *Coates* decision, moreover, has apparently been repudiated by the later Second Circuit decision in *Bendheim* v. *Commissioner*, 214 F. 2d 26, 28.

ciency after commencement of the refund suit. But surely the Government is not under any duty, as taxpayer apparently assumes, to perfect taxpayer's right to sue for refund by resorting to its lien foreclosure and seizure powers in order to extract from taxpayer the portion of the deficiency which he has declined voluntarily to pay. As Judge Woodrough observed in his dissenting opinion in the *Bushmiaer* case (p. 154), "no weight should be ascribed in deciding this case to existence of powers to collect unpaid portions of taxes by seizures." At any rate, taxpayer's liability for the entire deficiency—the unpaid as well as paid portion—turns upon the same legal issue (ordinary or capital loss), and the District Court's determination with respect to any part of the deficiency will necessarily be dispositive of the validity of the entire deficiency. Although taxpayer admittedly has paid only a part of the deficiency, he is here seeking in the guise of a refund action an adjudication by the District Court of his total tax liability.

7. TAXPAYER'S CLAIM OF UNDUE HARDSHIP

Equally without merit is taxpayer's charge of undue hardship in requiring him either to resort to the Tax Court for a redetermination of the Commissioner's deficiency determination, or to pay the entire deficiency as a prerequisite to a refund suit in the District Court. (Br. 9–10.) A taxpayer has ninety days from receipt of the notice of deficiency in which to decide whether to file a petition for redetermination in the Tax Court. (1954 Code, Section 6213.) Far from subjecting him to hardship, the system devised by Congress for en-

abling a taxpayer to litigate the correctness of an asserted deficiency affords him ample opportunity to select the Tax Court in lieu of a District Court as the litigation forum, and to do so without paying any part of the deficiency in advance.* Indeed, it was for the very purpose of affording taxpayers such a choice that the Tax Court was created as a specialized tribunal for adjudicating tax controversies. *Old Colony Tr. Co.* v. *Commissioner*, 279 U. S. 716; *Dobson* v. *Commissioner*, 320 U. S. 489. Whether any changes should be made in the existing system, and if so, what they should be, are matters for the Congress, not the courts.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court of Appeals is correct and should be affirmed.

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*Moreover, taxpayer's contention that the District Court has jurisdiction of this refund suit notwithstanding only a partial prepayment of the deficiency, because voluntary prepayment of the full amount would have entailed hardship, is scarcely consistent with his simultaneous contention that jurisdiction attached because the Government could have forced him involuntarily to pay the unpaid portion by resorting to foreclosure and seizure powers.

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